

No. 15645

United States
Court of Appeals
For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WIL-
LIAM L. KOCH, ROSE KOCH, REBECCA
KOCH ABEL, MAURICE P. KOCH and
DAISY KOCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

OCT 10 1957

PAUL P. G. NEWARK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

LEON SCHILLER, ESQ.,
105 Montgomery Street,
San Francisco, California,
For Appellants,

LLOYD H. BURKE, ESQ.,
United States Attorney,
LYNN J. GILLARD, ESQ.,
Assistant United States Attorney,
Post Office Building,
San Francisco, California,
For Appellee.

In the United States District Court for the North-
ern District of California, Southern Division

No. 34762—Civil

HAROLD M. KOCH, BESSIE KOCH, WILLIAM
L. KOCH, ROSE KOCH, REBECCA KOCH
ABEL, MAURICE P. KOCH and DAISY
KOCH,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

EXCERPT FROM DOCKET ENTRIES

1955

July 5—Filed complaint with demand for jury
trial and issued summons.

* * *

Oct. 24—Filed answer by defendant.

* * *

1956

July 23—Ordered for jury trial Sept. 17, 1956.

Sept. 13—Ordered case continued to Nov. 12, 1956,
for trial.

Sept. 19—Ordered case continued to Nov. 13, 1956,
for trial.

* * *

Nov. 26—Jury trial. Jury impaneled, evidence and
exhibits introduced and further trial con-
tinued to Nov. 27, 1956.

1956

- Nov. 27—Further jury trial. Evidence and exhibits introduced and further trial continued to Nov. 28, 1956, at 10 a.m.
- Nov. 28—Further jury trial. Evidence and exhibits introduced; motion of United States to amend Par. 2, of 11 & 13 counts of answer denied; motion of U.S.A. for directed verdict as to \$15,000.00 advanced by Maurice P. Koch granted; motion for directed verdict as to remainder of money advanced by H. Koch & Sons denied and further trial continued to Nov. 29, 1956.
- Nov. 29—Further jury trial. Arguments heard, jury retired and returned verdict for defendant. Motion of plaintiff for judgment notwithstanding verdict, continued to Nov. 30, 1956, at 10:30 a.m. Counsel for defendant to prepare findings, conclusions and form of judgment.
- Nov. 29—Filed verdict.
- Nov. 30—Arguments on motion for judgment notwithstanding verdict and motion to set aside special verdict. Both motions submitted.
- Dec. 3—Filed order denying motion of plaintiff for judgment notwithstanding verdict and to set aside verdict.
- Dec. 6—Lodged findings of fact and conclusions of law by defendant.
- Dec. 6—Lodged Judgment on special verdict by defendant.

1956

Dec. 28—Lodged findings of fact and conclusions of law by plaintiff.

1957

Jan. 23—Filed findings & conclusions (prepared by Court).

Jan. 23—Entered judgment on special verdict—filed Jan. 23, 1957, that plaintiff take nothing by their complaint and judgment awarded U.S.A. for costs.

Jan. 23—Mailed notices.

Jan. 25—Filed memorandum of costs by defendant (\$106.00).

Jan. 29—Costs taxed \$106.00.

Feb. 1—Filed notice and motion by plaintiff for new trial, Feb. 21, 1957.

* * *

Feb. 21—Ordered after hearing motion for new trial submitted.

Mar. 5—Filed order denying motion for new trial.

* * *

Apr. 18—Filed notice of appeal by plaintiff.

Apr. 18—Filed appeal bond in sum \$250.00.

Apr. 19—Mailed notices.

May 21—Filed order extending time to docket appeal to June 30, 1957.

June 18—Filed order extending time to docket appeal to July 17, 1957.

June 8—Filed appellants' designation of record on appeal.

[Title of District Court and Cause.]

SPECIAL VERDICT

During the year 1947, was H. Koch and Sons regularly engaged in the business of financing motion picture ventures?

Answer: "No."

/s/ CHARLES L. PHIPPS,
Foreman.

[Endorsed]: Filed November 29, 1956.

[Title of District Court and Cause.]

ORDER

The plaintiffs' motion for judgment notwithstanding the verdict and for setting aside the special verdict may be denied.

Dated: December 3, 1956.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed December 3, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on November 26, 1956; November 27, 1956; No-

vember 28, 1956; and November 29, 1956, before the Court and a jury duly impaneled and sworn, Honorable O. D. Hamlin, United States District Judge presiding. Max Fink, Esq., and Leon Schiller, Esq., appeared for plaintiffs and Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, appeared for defendant. Oral and documentary evidence was introduced and stipulations were made between respective counsel. The Court granted a directed verdict against the plaintiff Maurice P. Koch. Pursuant to stipulation, after instructions by the Court, a single interrogatory was submitted to the jury on November 29, 1956, and all other matters were left to the determination by the Court. The single interrogatory submitted to the jury and the special verdict thereon rendered by the jury is as follows:

“During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?

Answer: No.”

On the basis of the evidence and stipulations, the Court makes the following:

FINDINGS OF FACT

1. The plaintiffs, Harold M. Koch, William L. Koch, Rebecca Koch Abel and Maurice P. Koch are brothers and sister. The said plaintiffs entered into a partnership pursuant to written agreement on December 31, 1941, and ever since said date have con-

tinued as partners under the firm name and style H. Koch & Sons.

2. The written articles of co-partnership of December 31, 1941, provided that the partnership would engage in the business of manufacturing luggage. Said articles of co-partnership were amended by written agreement dated October 23, 1944, pursuant to which the partners agreed to also engage in the business of financing motion picture productions. The said partnership agreement, as amended, has remained in full force and effect at all times herein mentioned.

3. The plaintiff, Bessie Koch, is the wife of the plaintiff Harold Koch; the plaintiff Rose Koch is the wife of William L. Koch; and the plaintiff Daisy Koch is the wife of the plaintiff Maurice P. Koch.

4. The above-entitled action was brought by plaintiffs to recover income taxes assessed and collected by defendant for the years 1945 and 1947, pursuant to the provisions of the Internal Revenue Code of 1939.

5. For the years 1945, 1946 and 1947, Maurice P. Koch, William L. Koch, Harold M. Koch and Rebecca Koch Abel were partners in the business of manufacturing and selling luggage, doing business under the firm name of H. Koch & Sons.

6. In 1946, H. Koch & Sons loaned \$75,000.00 to Beacon Pictures Corporation. As consideration for

the use of its money, H. Koch & Sons was to receive from the Beacon Pictures Corporation 6% interest per annum and a percentage of the profits of a film to be made, named Copacabana. The entire \$75,000.00 loan became worthless in 1947, and each partner's share of the loss was \$18,750.00.

7. The partnership of H. Koch & Sons timely filed a partnership income tax return for the year 1947, indicating a net income of \$19,223.19. Thereafter, an amended return was filed indicating a net loss of \$55,776.82 which resulted from a deduction of the \$75,000.00 loss.

8. Each of the plaintiffs timely filed individual income tax returns for the calendar years 1945 and 1947 with the United States Collector of Internal Revenue for the First District of California. Each of the plaintiffs filed with the same Collector original and amended claims for refund of taxes paid for the years 1945 and 1947 as follows:

	1945		1947	
	Original	Amended	Original	Amended
Harold M. Koch.....	\$ 3,623.90	\$ 3,623.90	\$223.00	\$223.00
Bessie Koch	3,673.08	3,673.08	318.00	318.00
William L. Koch.....	3,623.90	3,623.90	223.00	223.00
Rose Koch	3,673.08	3,673.08	318.00	318.00
Rebecca Koch Abel....	12,142.17	12,142.17	605.61	605.61
Maurice P. Koch.....	4,649.77	4,649.77	860.62	860.62
Daisy Koch	4,797.74	4,797.74	860.63	860.63

The Collector advised each of the plaintiffs that the claims for the year 1945 were denied, and that the claims for the year 1947 would not be allowed on the theory advanced to support the claims, but would be

allowed as a non-business bad debt and not otherwise.

9. The loss sustained by H. Koch & Sons and its respective partners in the year 1947 by reason of the said sums thus advanced resulted from a non-business bad debt.

10. Maurice P. Koch was not engaged in the business of financing motion picture ventures during the calendar year 1947.

11. In the complaint, the plaintiffs raised, among others, the following issues: (1) that the \$75,000.00 loss by the partnership of H. Koch & Sons and the alleged \$15,000.00 loss by Maurice P. Koch and Daisy Koch were incurred in the business of producing motion pictures or in a joint venture and (2) that the \$75,000.00 loss by the partnership of H. Koch & Sons and the alleged \$15,000.00 loss by Maurice P. Koch and Daisy Koch were incurred in a business regularly carried on other than the business of financing motion picture ventures. By stipulation of the parties prior to submission of the case to the jury the above issues were withdrawn.

12. The parties stipulated that the plaintiffs rights to recover the alleged overpayments of taxes would require the jury to answer "yes" to the following interrogatory submitted to them:

"During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?"

On the basis of the answer to the special interrogatory submitted to the jury, the stipulations made by the parties and the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The \$75,000.00 loss incurred by H. Koch & Sons in the year 1947 was not a loss incurred in the trade or business of H. Koch & Sons or incurred in any transaction entered into for profit, within the meaning of Section 23(e) of the Internal Revenue Code of 1939.

2. The \$15,000.00 loss alleged to have been individually suffered by Maurice P. Koch and Daisy Koch was not a loss incurred in a trade or business or incurred in any transaction entered into for profit, within the meaning of Section 23(e) of the Internal Revenue Code of 1939.

3. The \$75,000.00 loan to Beacon Pictures Corporation by H. Koch & Sons which became worthless in 1947 was a nonbusiness debt within the meaning of Section 23(k) of the Internal Revenue Code of 1939.

4. The \$15,000.00 loan made by Maurice P Koch and Daisy Koch, individually, which became worthless in the year 1947 was a nonbusiness debt within the meaning of Section 23(k) of the Internal Revenue Code of 1939.

5. The \$75,000.00 loss suffered by H. Koch & Sons in the year 1947 is not an allowable deduction

in arriving at the net operating loss pursuant to the provisions of Section 122 of the Internal Revenue Code of 1939.

6. The \$15,000.00 loss suffered by Maurice P. Koch and Daisy Koch in the year 1947 is not an allowable deduction in arriving at the net operating loss pursuant to the provisions of Section 122 of the Internal Revenue Code of 1939.

7. The income taxes assessed and collected from plaintiffs by defendant for the years 1947 and 1945 were validly assessed and collected pursuant to the provisions of the Internal Revenue Code of 1939.

8. The defendant the United States of America is entitled to judgment that plaintiffs recover nothing and that defendant recover its costs incurred.

Dated: January 23, 1957.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed January 23, 1957.

In the District Court of the United States for the
Northern District of California, Southern Di-
vision.

No. 34762

HAROLD M. KOCH, BESSIE KOCH, WILLIAM
L. KOCH, ROSE KOCH, REBBECA KOCH
ABEL, MAURICE P. KOCH and DAISY
KOCH,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT ON SPECIAL VERDICT

The above-entitled action came on regularly for trial on November 26, 1956; November 27, 1956; November 28, 1956; and November 29, 1956, before the Court and jury empaneled and sworn, Honorable O. D. Hamlin, United States District Judge presiding. Max Fink, Esq., and Leon Schiller, Esq., appeared for plaintiffs, and Lloyd H. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, and Marvin D. Morgenstein, Esq., Assistant United States Attorney, appeared for defendant. Oral and documentary evidence was introduced and stipulations were made by respective counsel that the jury should be required to return a special verdict in the form of a finding on the issue of fact. Counsel for plaintiff and defendant thereupon stipulated that a special verdict be

returned in the form of an answer to the written interrogatory hereinafter set forth and that all other issues in the case would be determined by the Court.

After argument by respective counsel, and instructions by the Court having been given to the jury for consideration in answering the interrogatory, and the jury on the 29th day of November, 1956, having returned its special verdict which was as follows:

“During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?

Answer: No.

/s/ CHARLES L. PHIPPS,
Foreman.”

And the Court having directed a verdict in favor of the defendant against Maurice P. Koch and Daisy Koch for the portion of the claims based upon the individual loan of \$15,000 by Maurice P. Koch; and having denied plaintiffs' motions for judgment notwithstanding the verdict and to set aside the special verdict; and the Court having made findings of fact and having found as a conclusion of law that by reason of the directed verdict and the special verdict and the findings of fact, plaintiffs are entitled to take nothing by their complaint and that judgment should be entered in favor of defendant.

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by their complaint, and

that judgment is awarded to defendant United States of America, together with its costs in this action amounting to the sum of \$106.00.

Dated: January 23, 1957.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed and entered January 23, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW TENDERED BY PLAINTIFFS

The above-entitled action came on regularly for trial on November 26, 1956; November 27, 1956; November 28, 1956, and November 29, 1956, before the Court and a jury duly impaneled and sworn, Honorable O. D. Hamlin, United States District Judge presiding. Max Fink, Esq., and Leon Schiller, Esq., appeared for plaintiffs and Lloyd N. Burke, Esq., United States Attorney, by Lynn J. Gillard, Esq., Assistant United States Attorney, and Marvin D. Morgenstein, Esq., Assistant United States Attorney, appeared for defendant. Oral and documentary evidence was introduced and stipulations were made between respective counsel. The Court granted a directed verdict against the plaintiff, Maurice P. Koch. Pursuant to stipulation, after instructions by the Court, a single interrogatory was submitted to the jury on November 29, 1956, and all

other matters were left to the determination by the Court. The single interrogatory submitted to the jury and the special verdict thereon rendered by the jury is as follows:

“During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?

Answer: No.”

On the basis of the evidence and stipulations, the Court makes the following:

Findings of Fact

1. The plaintiffs, Harold M. Koch, William L. Koch, Rebecca Koch Abel and Maurice P. Koch are brothers and sister. The said plaintiffs entered into a partnership pursuant to written agreement on December 31, 1941. and ever since said date have continued as partners under the firm name and style of H. Koch & Sons.

2. The written articles of copartnership of December 31, 1941, provided that the partnership would engage in the business of manufacturing luggage. Said articles of copartnership were amended by written agreement dated October 23, 1944, pursuant to which the partners agreed to also engage in the business of financing motion picture productions. The said partnership agreement, as amended, has remained in full force and effect at all times herein mentioned.

3. The plaintiff, Bessie Koch is the wife of the plaintiff Harold Koch; the plaintiff Rose Koch is

the wife of William L. Koch; and the plaintiff Daisy Koch is the wife of the plaintiff Maurice P. Koch.

4. In 1946 H. Koch & Sons advanced the sum of \$80,000.00 to Beacon Pictures Corporation and the sum of \$10,000.00 to the individual promoters of said Beacon Pictures Corporation, all of which funds were advanced for the promotion and production of a motion picture entitled "Copacabana." Although the entire transaction was conducted as a partnership transaction, the sum of \$15,000.00 of the said sum advanced was especially contributed by the plaintiff Maurice P. Koch for the specific purpose of the said motion picture project and pursuant to the said partnership agreement, as amended, the said Maurice P. Koch was entitled to share proportionately to the extent of the sum of \$75,000.00 contributed by the partnership and entitled to a separate share for the additional funds advanced by him and which were not matched by the remaining partners.

5. Pursuant to written agreements entered into by and between H. Koch & Sons and said Beacon Pictures Corporation it was provided that the sum of \$80,000.00 would be repaid to H. Koch & Sons of and from the proceeds from the distribution and exploitation of the picture "Copacabana" throughout the world, subject to and following the repayment from such proceeds to Bank of America National Trust and Savings Association of the sum of \$730,000.00 and to Standard Capital Company of

the sum of \$277,538.32, and also subject to deduction of the distributors' charges. Pursuant to the said agreement and in consideration of said advance Beacon Pictures Corporation transferred and assigned to H. Koch & Sons, 13 8/10% interest in the said motion picture and in all profits and interests therein.

6. That pursuant to said written agreement between said Beacon Pictures Corporation and H. Koch & Sons it was further provided that in the event the proceeds derived from the sale, distribution and exploitation were insufficient to repay the said \$80,000.00 that said Beacon Pictures Corporation would repay the same in any event.

7. That the sum of \$10,000.00 advanced by H. Koch & Sons to the promoters of the motion picture was advanced pursuant to an agreement wherein and whereby it was provided that the said sum would be repaid only if the project was successful and if the promoters realized profits from their interests in the venture.

8. The motion picture "Copacabana" was not successful and resulted in a loss in the year 1947.

9. During the year 1947, H. Koch & Sons was not regularly engaged in the business of financing motion picture ventures.

10. The partnership of H. Koch & Sons timely filed a partnership income tax return for the year 1947, indicating a net income of \$19,223.19. Thereafter, an amended return was filed indicating a net

loss of \$55,776.82 which resulted from a deduction of the \$75,000.00 loss.

11. Each of the plaintiffs timely filed individual income tax returns for the calendar years 1945 and 1947 with the United States Collector of Internal Revenue for the First District of California. Each of the plaintiffs filed with the same Collector original and amended claims for refund of taxes paid for the years 1945 and 1947 as follows:

	Original	1945 Amended	Original	1947 Amended
Harold M. Koch.....	\$ 3,623.90	\$ 3,623.90	\$223.00	\$223.00
Bessie Koch	3,673.08	3,673.08	318.00	318.00
William L. Koch.....	3,623.90	3,623.90	223.00	223.00
Rose Koch	3,673.08	3,673.08	318.00	318.00
Rebecca Koch Abel....	12,142.17	12,142.17	605.61	605.61
Maurice P. Koch.....	4,649.77	4,649.77	860.62	860.62
Daisy Koch	4,797.74	4,797.74	860.53	860.53

The Collector determined and advised each of the plaintiffs of the Collector's determination that the claims for the year 1945 were denied, and that the claims for the year 1947 would be allowed as a non-business bad debt and not otherwise.

12. That the loss sustained by H. Koch & Sons and its respective partners in the year 1947 by reason of the said sums thus advanced resulted from a non-business bad debt.

Conclusions of Law

1. The loss incurred by H. Koch & Sons in the year 1947 as a result of its investment in the picture "Copacabana" was not a loss incurred in the trade or business of H. Koch & Sons within the

meaning of Section 23(e) of the Internal Revenue Code of 1939.

2. The sums advanced by H. Koch & Sons for the promotion and production of the motion picture "Copacabana" and which became worthless in 1947 was a non-business debt within the meaning of Section 23(k) of the Internal Revenue Code of 1939.

3. The said loss suffered by H. Koch & Sons in the year 1947 is not an allowable deduction in arriving at the net operating loss pursuant to the provisions of Section 122 of the Internal Revenue Code of 1939.

4. The income taxes assessed and collected from plaintiffs by defendant for the years 1947 and 1945 were validly assessed and collected pursuant to the provisions of the Internal Revenue Code of 1939.

5. The defendant the United States of America is entitled to judgment that plaintiffs recover nothing, and that defendant recover its costs incurred.

Dated: December . ., 1956.

.....,

O. D. HAMLIN,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged December 28, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
NEW TRIAL

To the defendant above named and to Lynn J. Gillard and Marvin D. Morgenstein, its attorneys:

Please Take Notice that the undersigned will bring the motion for new trial on for hearing before this Court, in the United States Post Office Building, 7th and Mission Streets, San Francisco, California, on the 21st day of February, 1957, at 9:30 a.m., or as soon thereafter as counsel can be heard.

Dated: February 1, 1957.

LEON SCHILLER,
MAX FINK,

By /s/ LEON SCHILLER,
Attorneys for Plaintiffs.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Plaintiffs, Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch and Daisy Koch, move this Court, Hon. O. D. Hamlin presiding, to set aside the judgment herein and to grant a new trial of the above cause for these reasons:

1. Judgment contrary to law.

2. Judgment contrary to evidence.
3. Evidence is insufficient to support judgment.
4. Error as to admission of evidence.
5. Error as to exclusion of evidence.
6. Verdict not warranted by evidence.
7. Misconduct of counsel for the defendant.
8. Errors in instructions given.
9. Errors in refusal of requested instructions.
10. Errors in findings of fact.
11. Errors in conclusions of law.

Dated: February 1, 1957.

LEON SCHILLER,
MAX FINK,

By /s/ LEON SCHILLER,
Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 1, 1957.

[Title of District Court and Cause.]

ORDER

Plaintiff's motion for a new trial is denied.

Dated: March 5th, 1957.

/s/ O. D. HAMLIN,
United States District Judge.

[Endorsed]: Filed March 5, 1957.

PLAINTIFF'S REQUESTED INSTRUCTIONS

That it is admitted in this case that H. Koch & Sons is a copartnership consisting of Rebecca Koch Abel, Maurice P. Koch, Harold M. Koch, and William L. Koch.

That it is admitted in this case that the operations of H. Koch & Sons, a copartnership, for the year 1947, resulted in a loss for that year in the sum of \$55,776.82.

Your are further instructed that the amounts advanced by H. Koch & Sons to Beacon Pictures Corporation became bad debts and worthless in the year 1947 and contributed to the over-all loss sustained by H. Koch & Sons.

However, the treatment for income tax purposes of that loss would differ, depending upon whether or not H. Koch & Sons was regularly engaged in 1947 in the business of promoting and financing motion picture ventures.

In order for one to be regularly engaged in the conduct of a particular business, it is not necessary that he devote a major part or any particular part of his time and efforts to such business. Neither is it necessary that he devote a major portion or any particular portion of his capital to such business in order for it to be deemed to be a business regularly carried on by such taxpayer. The amount of time as well as the proportionate amount of capital devoted to a particular business are each factors to be con-

sidered in determining whether or not one is regularly engaged in a particular business.

A taxpayer may engage in or regularly conduct one or several businesses at the same time.

A taxpayer may be deemed to be regularly engaged in the conduct of a particular business even though he may devote most of his time, efforts, and capital to another business or other businesses.

That a trade or business may be regularly carried on by a taxpayer although he does not devote his personal attention to such trade or business. One may conduct a business through employees, agents, representatives and others without devoting one's personal time to such business, and such business may nevertheless be regularly carried on within the meaning of the law applicable to this case.

That taxpayers may act through employees, agents and other persons, firms and corporations appointed by such taxpayers, and that the acts of such employees, agents and other persons, firms and corporations appointed by taxpayers are in contemplation of law the acts of the taxpayers. Thus, in considering the activities of the taxpayers in the instant cause with relationship to the conduct of any business or enterprises, you are required to consider that the acts of any such employees, agents and other persons, firms and corporations appointed by them are in fact the acts and activities of the taxpayers.

The authorized act or acts of any one partner of H. Koch & Sons in connection with partnership busi-

ness or activities are in contemplation of law the act or acts and activities of all the partners.

If the taxpayer regularly and continuously participates in any certain activity then such activity may constitute the trade or business of the taxpayer.

That if you should find that H. Koch & Sons, acting through one or more of its partners, or acting through persons, firms, corporations or representatives appointed by said partnership, has regularly and continuously participated in the promotion and financing of motion picture ventures during the year 1947, then you must find that H. Koch & Sons was engaged in the business of financing and promoting motion picture ventures and that said business was regularly conducted.

The incidence of taxation depends upon the substance of a transaction and not upon the forms utilized by the parties to the transaction. The transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the transaction, is relevant.

The real facts, not bookkeeping entries, control the determination of taxable income. Account books are evidential but neither indispensable nor conclusive for or against the taxpayer or the government.

That in determining whether or not H. Koch & Sons was engaged in the business of financing motion picture ventures, you must consider, among

other things, the amount of time and effort expended in that direction, and such time and effort, if any, must be considered by you whether or not an actual venture was concluded.

That in considering the activities of H. Koch & Sons with relation to the business of financing motion picture ventures, you must consider all activities designed to advance the financing of such projects and you must consider the same whether or not the transactions were actually concluded.

That in considering the question as to whether or not H. Koch & Sons devoted substantial time to the financing of motion picture ventures, you are required to consider all of their activities relating to that purpose, and all activities and efforts actually expended in attempting to negotiate for and in attempting to enter into financial transactions relating to the business of financing motion picture ventures must be considered by you upon this issue, whether the same were concluded or not.

DEFENDANT'S INSTRUCTIONS

The plaintiffs here seek to recover income taxes paid pursuant to the Internal Revenue Laws of the United States. The issue here is the proper treatment of moneys advanced by the plaintiffs to Beacon Pictures Corporation. Plaintiffs seek to deduct the entire amount of this loan in arriving at their net income for the year 1947. To warrant such a deduction of the entire amount of the moneys alleged

to be advanced as a loan, the loan must have been incurred in the plaintiffs' trade or business. The Commissioner of Internal Revenue has determined that the loan was not incurred in the plaintiffs' trade or business.

If a bad debt is not incurred in a trade or business, the taxpayers may deduct it under another section of the Internal Revenue Code. Thus, the plaintiffs in this case would have been allowed a deduction even if you find the plaintiffs were not in the trade or business of promoting and financing motion picture ventures. If the debt is not incurred in a trade or business, the taxpayer is allowed to deduct \$1,000 against his current income, and carry over the amount of the debt which has not been deducted, to each of the next five years.

There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of promoting, organizing, and financing motion pictures is correct, and the plaintiffs have the burden of proving that this determination is wrong.

The burden is on the plaintiffs to overcome the presumption of correctness of the Commissioner's determination, and to prove by a preponderance of evidence that they were engaged in a trade or business of organizing, promoting and financing motion pictures. ~~The preponderance of the evidence means the greater weight of evidence; but this is not determined solely by the greater number of witnesses testifying to any particular fact. The testimony on~~

~~the part of the party on whom the burden rests must have greater weight in your estimation; have a more convincing effect than that opposed to it.~~

Proof by the taxpayers that they made frequent loans and investments in motion picture ventures is not sufficient to constitute a trade or business. And proof of other attempts to make loans or investments in motion picture ventures is not sufficient evidence for you to find that they regularly engaged in the business of promoting and financing motion picture ventures. Investing and financing is not a trade or business.

Isolated and infrequent promotion and financing of motion pictures is not a trade or business within the meaning of the Internal Revenue Laws. To constitute a trade or business it must be shown that the activity was extensive; it must be shown that the activity was regularly carried on; it must be shown that the activity constituted a substantial portion of the time, energy and effort of those who claim it is a trade or business.

In many instances for taxing purposes the law ignores the existence of a partnership.

United States vs. Coulby,
251 Fed, 982, 984 (N. D. Ohio), 1918;

Neuberger vs. Commissioner,
311 U. S. 83, 88 (1940).

Thus, the fact that a partnership was formed to finance motion pictures does not mean that the partners were engaged in the business of promoting

and financing motion pictures. There must exist that great devotion of time and energy by the individual partners to the promotion and financing of motion picture ventures before the taxpayers may claim they were regularly engaged in that business.

The business carried on by a corporation is not to be considered a business carried on by the shareholders, directors or officers. Thus merely because one is an officer, shareholder or director in a corporation which is engaged in the business of promoting and financing motion pictures, does not mean the shareholder or officer or director himself is engaged in the business of promoting and financing motion picture ventures.

There has been testimony of the activity of Maurice P. Koch as shareholder, officer and director of Producers Finance Corporation. I instruct you that the conduct of Maurice P. Koch in furtherance of the promotion and financing of motion picture ventures on behalf of Producers Finance Corporation may not be considered by you in determining whether any of the plaintiffs were engaged in the business of promoting and financing motion picture ventures if you believe Maurice P. Koch was acting in his capacity as a corporate officer, shareholder and director.

Defendant has put in issue the question of whether Maurice P. Koch individually loaned \$15,000 to Beacon Pictures Corporation. This issue is distinct from the question raised by the other interrogatories submitted to you. Accordingly, your answer to the

question of whether this money was loaned by Maurice P. Koch may differ with your answers to the other interrogatories.

Maurice P. Koch has alleged in the complaint that he individually loaned \$15,000 to Beacon Pictures Corporation in excess of the amount loaned by the Partnership of Koch & Sons. The complaint is not evidence in the case, nor are any allegations in the complaint evidence in this case. Thus, the burden still rests on Maurice P. Koch to prove by a preponderance of the evidence that individually he loaned \$15,000 to Beacon Pictures Corporation.

Counsel have a right, and indeed a duty, to argue the case to you. It is your duty to listen and to be attentive, and to give weight and consideration to the arguments of the counsel. However, in their comments upon the facts of the case, if you find that there is any discrepancy between what they stated to you to be the facts of the case and the words that have come from the mouths of the witnesses, you must disregard, if there is such conflict, the statement as to the facts made by the attorneys, and consider only the evidence given by the witnesses in that regard.

You are the sole judges of the credibility of each witness, and it is for you to pass on the reliability of each witness.

In determining the credibility of a witness, you may consider his interest in the outcome of the trial.

If you believe that Maurice P. Koch used his own money in any transaction, and was acting therein in his own behalf and not in behalf of H. Koch & Sons, that transaction is to be considered only in determining whether Maurice P. Koch was engaged in the business of financing motion picture ventures and can not be considered by you in determining whether the partnership of H. Koch & Sons was engaged in the business of financing motion picture ventures.

The burden of proof in this case is upon the plaintiffs to prove by a preponderance of the evidence that the loan by plaintiffs to Beacon Picture Corporation was a loan made in plaintiffs regular trade or business. ~~By preponderance of the evidence is~~ meant the greater weight of evidence, and if you find that the evidence is equal on both sides, then you should find for the defendant. You are further instructed that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the ~~plaintiffs.~~

In considering the testimony of each witness in this case you should take into consideration the interest of the witnesses, if any, who have testified, the manner in which they have given their testimony, their candor or lack of candor, their frankness or lack of frankness, the reasonableness or unreasonableness of their statements or opinions, and from all these facts and circumstances, together with all the other facts and circumstances in the

case, determine whether or not the loan in question was made as a part of plaintiffs' trade or business.

That the term "trade or business" as used in Sec. 23(e) of the Internal Revenue Code of 1939 does not encompass all activities engaged in for a profit. By "trade or business" is meant that trade or business which is regularly engaged in by plaintiffs and does not include occasional or isolated transactions entered into for profit.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch and Daisy Koch, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on January 23, 1957.

Dated: April 18, 1957.

MAX FINK,
LEON SCHILLER,

By /s/ LEON SCHILLER,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 18, 1957.

The United States District Court Northern District
of California, Southern Division

No. 34,762

HAROLD M. KOCH, BESSIE KOCH, WILLIAM
L. KOCH, ROSE KOCH, REBECCA KOCH
ABEL, MAURICE P. KOCH and DAISY
KOCH,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. O. D. Hamlin, Judge.

TRANSCRIPT OF TRIAL

November 26, 1956

Appearances:

For the Plaintiffs:

MAX FINK, ESQ., and
LEON SCHILLER, ESQ.

For the Defendant:

LLOYD H. BURKE, ESQ.,
United States Attorney, by
LYNN J. GILLARD, ESQ.,
Assistant U. S. Attorney.

(A jury of twelve persons was duly impaneled and sworn to try the cause.)

(Opening statements were made by counsel for the respective parties.)

The Court: Call your first witness.

Mr. Schiller: We will call Mr. Maurice P. Koch.

MAURICE P. KOCH

one of the plaintiffs, was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct Examination

By Mr. Fink:

Q. Mr. Koch, will you state your full name, please? A. Maurice P. Koch.

Q. Do you have a brother named Harold M. Koch? A. Yes, sir.

Q. Do you have a brother named William L. Koch? A. Yes.

Q. A sister named Rebecca Koch?

A. That is right.

Q. Your sister, Rebecca, has been married since this action was started, or prior to the starting of this action—I will withdraw the question.

Your sister, Rebecca Koch, has been married in the past few years? A. That is right.

Q. What is her name now?

A. Rebecca Abel. [4*]

Q. Are you and your brothers and your sister engaged in business? A. Yes.

Q. As a partnership? A. That is right.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Maurice P. Koch.)

Q. When was this partnership first started?

A. Started in 1941.

Q. Mr. Koch, I show you here a document which bears the date of December 31, 1941, and seems to bear the signatures of Maurice Koch, Rebecca Koch, Harold Koch, and William L. Koch. Are these the signatures of yourself, your two brothers and your sister that you just mentioned? A. They are.

Q. Is this your partnership agreement?

A. That is right.

Mr. Fink: May I have this marked as plaintiffs' 1 in evidence, your Honor?

Mr. Gillard: No objection.

The Court: It may be so marked.

(The partnership agreement referred to was marked Plaintiffs' Exhibit No. 1 in evidence.)

Q. (By Mr. Fink): I will show you here, Mr. Koch, a document which bears date the 23rd day of October, 1944, between the same parties, and it is called "Amendment to Agreement of December 31, 1941." Is this the amendment to the document [5] that has just been marked Exhibit 1?

A. That is right.

Q. And also the four signatures, "Rebecca Koch, Maurice Koch, Harold M. Koch, and William L. Koch," are these the signatures of yourself, your brothers and your sister? A. They are.

Mr. Fink: May we offer this as Exhibit 2, your Honor?

Mr. Gillard: No objection.

(Testimony of Maurice P. Koch.)

The Court: It may be so marked.

(The amendment to agreement referred to was marked Plaintiffs' Exhibit No. 2 in evidence.)

Q. (By Mr. Fink): Mr. Koch, I show you here a document which is called "Agreement of Partnership," and bears date the 23rd day of October, 1944, which I want to point out to you is the same date which appears on the document, Exhibit 2, which you just saw. This seems to be the agreement of partnership of Producers Syndicate.

A. That is right.

Q. Do you recall this document?

A. Yes, sir.

Q. Have you observed the signatures that appear on this document? A. Yes.

Q. Are you familiar with some of them?

A. All of them. [6]

Q. With all of them? A. Yes, sir.

Mr. Fink: We will offer this as Plaintiffs' Exhibit 3, your Honor—Agreement of Partnership of Producers Syndicate, October 23, 1944.

Mr. Gillard: I will object to that as being incompetent, irrelevant and immaterial and having no bearing upon the issues of this case. If the Court will permit me to take the witness on voir dire for the moment I will appreciate that. This is the situation which Mr. Fink referred to in his opening statement, in which no investment resulted, and as such it is our position that it has no bearing upon

(Testimony of Maurice P. Koch.)

the issues of the case. It does not show whether or not the plaintiffs were or were not in the business of financing motion picture production.

Mr. Fink: Your Honor, our position on that is that \$50,000 was invested. It ties in with the partnership agreement which was amended on that same date to permit this type of activity to go into the motion picture financing business.

The Court: It may be admitted and marked Plaintiffs' Exhibit 3, subject to a motion to strike.

(The agreement of partnership referred to was marked Plaintiffs' Exhibit No. 3.)

Q. (By Mr. Fink): Mr. Koch, did you know a Mr. David Hersh? A. Yes, sir. [7]

Q. Did you know a Mr. Sam Coslow?

A. Yes, sir.

Q. Did you know a Mr. David Sebastian?

A. Yes.

Q. How long have you known Mr. Sebastian?

A. Over 30 years.

Q. Is he related to you by marriage?

A. That is right.

Q. What is his relationship to you?

A. My brother-in-law.

Q. Mr. Hersh—when did you first meet him?

A. I met Mr. Hersh in the early part of 1946.

Q. What was the occasion of your meeting with Mr. Hersh?

A. I met Mr. Hersh—was brought to me relative to picture deals.

(Testimony of Maurice P. Koch.)

Q. Where did you meet Mr. Hersh?

A. I met Mr. Hersh—the first time I met Mr. Hersh was in Los Angeles.

Q. The Hollywood area there?

A. That is right.

The Court: What was his first name, please?

A. His first name was—I just can't think of it right now.

Mr. Fink: May I suggest the name? The witness seems to be confused.

Q. Was that David Hersh? [8]

A. David Hersh, that is right.

Q. You met him, you say, in Hollywood early in 1946? A. That is right.

Q. Did you have discussions with him?

A. Yes, we discussed the——

Q. Just a moment, please. Did you also have discussions with Mr. Coslow? A. That is right.

Q. Did you also have discussions with Mr. Sebastian at that time? A. Yes.

Q. Were these discussions held jointly or separately with each of these gentlemen?

A. Well, they were held jointly and I talked to each one of them in the room there.

Q. Approximately on how many occasions in the early part of 1946 did you see Mr. Hersh?

A. I saw Mr. Hersh several times. He would come up to San Francisco and I would visit with him in Los Angeles.

Q. Did you have telephone conversations with him, also? A. Yes.

(Testimony of Maurice P. Koch.)

Q. In your early discussions with Mr. Hersh what was the subject of your discussion?

A. The subject of the discussion was producing—promoting, rather, and financing a pre-production money on motion pictures. [9] We were going to——

Q. Tell us for a moment in a little more detail just what you mean by that.

A. We talked about making a lot of pictures. Mr. Hersh at that particular time was working for Ideal Factors in New York, and Mr. Hersh was in the business of loaning secondary money completion money to pictures that had already received bank money and pre-production money, and he had produced one, two, or three pictures himself.

We discussed going into the promotion and financing of motion pictures. We were going to make some big pictures and some B pictures.

Q. What part were you to play in this? What was your contribution toward the production of pictures going to be?

A. We were going to——

Mr. Gillard: I will object to the form of the question as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Fink: I will reframe the question, your Honor. I recognize this is all generally hearsay. However, the question is directed——

The Court: There is no need to discuss it, Counsel. Ask your next question. The objection is sustained.

(Testimony of Maurice P. Koch.)

Q. (By Mr. Fink): Mr. Koch, was there any discussion that you engaged in at that time with regard to the details of your [10] participation or activity in such a venture?

A. Yes; Mr. Hersh had told me about Sam Coslow. He was a very good friend of Mary Pickford's. Mary Pickford had arranged to give Sam Coslow three releases through United Artists. At that particular time releases were almost impossible to get.

So we decided to form a combine whereby we could use Sam Coslow's releases and we would put up the pre-production money, and Hersh would get the bank money and the secondary money from Standard Capital and start this first picture rolling, and at the turn of the camera we would recoup this pre-production money from the bank money and start the second picture rolling.

Q. Did these discussions occur over several different conversations and visits?

A. Yes, we had a lot of meetings.

Q. Have you given us the substance of the conversations that occurred in these meetings up to this particular point?

A. Well, the most important substance was that we were going to put up the money for the pre-production, and we were going to have something to say as to how the money was used in the pre-production, and Hersh and Sebastian were going to form a partnership to watch over all of these things for me. We were going into this—we found this story. "Copacabana," that we were going into. We also

(Testimony of Maurice P. Koch.)

discussed the participation that we [11] would receive——

Mr. Gillard: Just a minute. Is this a continuation of the same answer?

Is there a question pending of the witness?

Mr. Fink: The last statement may go out.

The Court: Very well.

Q. (By Mr. Fink): Mr. Koch, I show you here a document between Copacabana, Inc., as owner and producer, the name being left blank as to who the producer is. It bears date of April 8, 1946. It appears to be signed by Copacabana, Inc., by Monte Proser as president, Beacon Pictures, Inc., by George Frank, secretary. Are you familiar with this document?

A. Yes, sir. That grants him the right to the name "Copacabana," and the story.

Mr. Fink: The document will speak for itself.

May we offer this, your Honor, as Plaintiffs' Exhibit 4?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial, having no bearing on the question of the plaintiffs' activities in this case. This is an agreement between two third persons.

The Court: It is time to take the recess at this time. We will take a recess until 2:00 p.m., and I will have an opportunity to look at that at 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [12]

Monday, November 26, 1956, 2:00 P.M.

The Court: Before the recess you offered this document dated April 8, 1946. It may be received in evidence subject to a motion to strike if it is not connected up.

(The Copacabana rights agreement referred to was marked Plaintiff's Exhibit No. 4 in evidence.)

MAURICE P. KOCH

one of the plaintiffs, a witness in his own behalf, on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Fink:

Q. Mr. Koch, you told us this morning about your discussions with regard to setting up an operation to finance independent producers and participate in the so-called preproduction or promotion of pictures. Did you discuss this venture and this plan with your brothers, who were your partners, and your sister?

A. Yes. We went through this quite thoroughly, even at the beginning of all these ventures.

Q. Can you tell us whether or not they likewise had discussions with Mr. Hersh?

A. They talked to Mr. Hersh when he was in San Francisco, and he talked to my brothers and sister.

(Testimony of Maurice P. Koch.)

Q. Did they likewise have discussions, to your knowledge, [13] on that subject with Mr. Sebastian?

A. They talked with Mr. Sebastian, too, quite frequently.

The Court: When you say "they," who do you mean?

A. I mean Mr. Sebastian talked to my sister and my brothers quite frequently on these picture deals.

Q. (By Mr. Fink): About this plan?

A. Yes.

Q. And about these ventures?

A. That is right.

Q. Did H. Koch and Sons have legal counsel in San Francisco? A. Yes, sir.

Q. Who was the attorney for your partnership?

A. Morris M. Grupp.

Q. Do you know whether or not Mr. Grupp did anything on behalf of the partnership and as counsel for the partnership in connection with this plan of picture ventures?

A. Well, Mr. Grupp sat in with Hersh and Sebastian when they came up here talking about these picture deals, and myself.

Q. Who was Mr. Grupp acting for in that regard?

A. Mr. Grupp was acting in my behalf?

Q. When you say your behalf you mean you, personally?

A. No; for the firm of H. Koch and Sons.

(Testimony of Maurice P. Koch.)

Q. By the way, in this firm of H. Koch and Sons, do you have a brother, Harold?

A. Yes. [14]

Q. Generally, since the year 1941, what have been his activities in that business?

A. My brother, Harold, has been the plant manager. He has run the factory.

Q. Did he actually do labor in the plant?

A. Yes, he did labor in the plant, and ran the factory.

Q. Going back to the year 1941, when you first started your business—and I assume it was a great deal smaller at that time than it is now——

A. That is correct.

Q. ——what were his duties at that time?

A. His duties were to—well, he would receive the orders, make up cutting tickets, and supervise the entire plant, and supervise the merchandise going through the plant.

Q. Your brother, William, what did he do?

A. He assisted my brother, Harold.

Q. What did your sister do?

A. My sister was in charge of the books.

Q. She is referred to by the name of “Beck”?

A. “Beck,” that is right.

Q. Her name is Rebecca?

A. Rebecca Koch Abel, yes.

Q. She took care of the bookkeeping?

A. That is right.

Q. She ran the office, more or less? [15]

A. That is right.

(Testimony of Maurice P. Koch.)

Q. What did you do?

A. I was the general manager of the plant. I took care of the financing of the business, took care of bank loans, took care of the buying and the selling of merchandise, took care of most everything that went in and out of the place.

Q. Were you referred to by any title?

A. No. I was the general manager—what you would call the boss of the business.

Q. Has that same arrangement continued ever since the time that you, your brothers and your sister took over this business in 1941?

A. Yes.

Q. It had previously been your father's business?

A. That is correct.

Q. You mentioned this morning that a man named Sam Coslow had an arrangement with United Artists, Mr. Koch.

A. That is right.

Q. I show you here a document which bears date of April 16, 1946, which purports to be a contract between Sam Coslow and United Artists Corporation. Have you had occasion to see this document?

A. Yes.

Q. You have made a study of it, have you?

A. Not recently. [16]

Q. But you have seen it?

A. Yes, I was very much interested in that in 1946.

Q. Could you recognize the signature of Sam Coslow?

A. It does look like his signature?

(Testimony of Maurice P. Koch.)

Mr. Fink: I will offer this document as plaintiffs' next in order, your Honor. It purports to be an agreement between Sam Coslow and the United Artists Corporation dated April 16, 1946. It generally provides for the distribution of the films throughout the world.

Mr. Gillard: I object to it, if your Honor please, on the ground that no foundation has been laid for the introduction of it in evidence.

The Court: I do not see the foundation.

Mr. Fink: May I have it marked at this time plaintiffs' next in order?

The Court: Exhibit 5 for identification.

(The agreement referred to was marked
Plaintiffs' Exhibit No. 5 for identification.)

Mr. Fink: I will seek to identify the signatures by a later witness in this case, your Honor.

Q. I think you told us this morning that the first of these films, in 1946, in which you intended to participate in the preproduction matters was a picture called Copacabana. Can you tell us whether or not a corporation was organized with respect to that picture? [17]

A. Well, a corporation was subsequently organized for that picture.

Q. What was the name of that corporation?

A. Beacon Pictures Corporation.

Q. Were you an officer of that corporation?

A. No, sir.

(Testimony of Maurice P. Koch.)

Q. Did you ever receive any salary from that corporation for your personal efforts?

A. No, sir.

Q. I show you here what purports to be a photostat of a check of April 25, 1946. It purports to have been drawn by H. Koch and Sons to the order of David Sebastian. Is this your signature and is that in your handwriting?

A. Yes, sir.

Q. On the reverse side it purports to bear the endorsement of David Sebastian and Dave Sebastian. Are those his signatures?

A. Those are his signatures.

Mr. Fink: May I offer this as plaintiff's next in order?

Mr. Gillard: No objection.

The Court: Exhibit 6.

(The photostatic copy of the check referred to was marked Plaintiffs' Exhibit No. 6 in evidence.)

Mr. Fink: Perhaps we should note for the record, your Honor, that by stipulation between counsel it has been agreed [18] that photostats may be used with the same force and effect as originals throughout this cause, unless particular objection is made.

Is that so stipulated?

Mr. Gillard: With reference to those documents I have seen photostats of prior to this time, yes, Mr. Fink.

(Testimony of Maurice P. Koch.)

The Court: Who do you contend is the maker of this check, counsel?

Mr. Fink: The maker of the check, your Honor, is H. Koch and Sons.

The Court: It appears to be on the personal check of Maurice P. Koch. It appears also to have the personal signature of Maurice P. Koch. That is the reason I asked the question. It does not appear to be a check of Koch and Sons on the printed portion of it.

Mr. Fink: Your Honor, the check appears to be a blank check of Maurice P. Koch, one of his blank forms with his name printed on it. However, the signature reads "H. Koch and Sons," and it is signed by Mr. Koch as a partner.

The Court: It doesn't say "By Maurice Koch." There is no "By" there, is there?

The Witness: May I explain that, your Honor?

The Court: Ask the witness. The check, itself, does not indicate what you say it does.

Q. (By Mr. Fink): Mr. Koch, I show you this check of April [19] 25, 1946. Upon whose bank account was that check drawn?

A. It was drawn on the account of H. Koch and Sons.

Q. Who made out the check?

A. I made out the check.

Q. I see that you did not use a regular partnership check form for it. A. That is right.

Q. You wrote in the "H. Koch and Sons."

A. Yes, sir. May I explain this, Mr. Fink?

(Testimony of Maurice P. Koch.)

Q. Yes.

A. I made out a lot of checks like this, your Honor. I am in a place where I do not have a firm check with me, and the bank will honor any check. As a matter of fact, our checks are all printed this way, "H. Koch and Sons," on the bottom, irrespective of what is above the check. As long as the signature of the check appears with H. Koch and Sons, and my signature below the H. Koch and Sons, that would be a firm check and would be withdrawn from the account of H. Koch and Sons.

The Court: Don't you write "By"?

A. No, sir, not on any check, no, sir; it isn't necessary.

Q. Do you ordinarily use your personal check to make a check upon the firm funds?

A. Only when I am in a deal where I might be at a luncheon in Los Angeles, and we are sitting there, and I have to write [20] a check, I will use my own check, my own personal check, a counter check, or a blank check. I have done that on very many occasions. And the bank has honored all these checks with my signature underneath the firm name of H. Koch and Sons. It doesn't have to be a printed check. And this check is legal tender, a legal check.

Mr. Fink: If your Honor please, may I at this time, since there has been discussion about the check, pass the check to the jury to view at this time?

The Court: You may.

(Testimony of Maurice P. Koch.)

Proceed with your next question, Counsel.

Q. (By Mr. Fink): Mr. Koch, what was that check for, the \$15,000 represented by that check? What was it for?

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: I think he may answer for what purpose he gave it.

A. That check was an advancement to Dave Sebastian for the purpose of setting up the corporation of Beacon Pictures Corporation, relative to Hersh and Coslow's interest in that corporation, and \$5,000—\$10,000 of that check was for that purpose. The other \$5,000 was an advancement to the Hersh and Sebastian partnership for expenses to carry on the show and to get things going and rolling on this particular picture. All those moneys were to come back to us—— [21]

Q. (By Mr. Fink): Just what they were for, is the question. A. Yes.

Q. You say \$10,000 was to get the corporation started—Beacon Pictures Corporation. Is that the one you have reference to?

A. That is right.

Q. And \$5,000 was for what?

A. To get the picture going, for expenses—the “Copacabana” picture.

Q. Had there been any picture, at that time, made?

A. No, sir. This was part of the pre-production money, or for preproduction.

(Testimony of Maurice P. Koch.)

Mr. Gillard: I ask that that go out as the opinion and conclusion of the witness, and move to strike it out. He has testified it went to Hersh and Sebastian.

The Court: The latter part may be stricken.

Q. (By Mr. Fink): I show you here what purports to be a letter of May 17, 1946, or a receipt. It purports to bear the signature of David Hersh. Do you recognize Mr. Hersh's signature?

A. Yes.

Q. That is his signature?

A. That appears to be, yes.

Mr. Fink: We will offer that as plaintiffs' next in order, your Honor. [22]

Mr. Gillard: No objection.

The Court: Exhibit 7.

(The letter-receipt referred to was marked Plaintiffs' Exhibit No. 7 in evidence.)

Mr. Fink: I was wondering, your Honor, if it might be helpful to read this into the record at this time.

The Court: It is in evidence and the jury can see it, and will see it, at such time as may be proper. I think it would only encumber the record by reading it in there. It is already in evidence. Do you desire to question the witness about the letter?

Mr. Fink: Not at this time, your Honor.

The Court: If you do not, I do, Counsel, to get something clear in my mind.

Q. You stated of the \$15,000 that was mentioned

(Testimony of Maurice P. Koch.)

in this check dated April 25, 1946, that \$10,000 was to be used by David Sebastian.

A. \$10,000 was to be used by Hersh and Coslow in the forming of the corporation.

Q. For what? What was it to be for?

A. The corporation was to be the vehicle by which they would transact all the business of "Copacabana."

Q. Were you making a gift of this \$15,000?

A. No, sir.

Q. What did you get for it? [23]

A. Well, when the corporation was dissolved, I was to receive my \$10,000.00 back from Hersh and Coslow, plus a part of their percentage of the picture.

Q. You were to get a percentage of the profits of the picture, were you? A. That is right.

Q. In this letter of May 17, 1946, the opening sentence says, "I hereby acknowledge receipt from you of your check in the sum of \$10,000.00." Is that the \$10,000.00 that you say was represented by a portion of this check? A. Yes, sir.

Q. It then goes on to say, "You are delivering your check to me to be utilized for the purpose of purchasing 40 per cent of the stock of Beacon Pictures Corporation?"

A. That is right.

Q. That was the purpose of the money then?

A. That is right.

Q. (By Mr. Fink): Did you, Mr. Koch, expend other moneys for the expenditures incurred by Se-

(Testimony of Maurice P. Koch.)

bastian and Hersh in the putting together or promotion of this motion picture "Copacabana," that is, funds in addition to the \$15,000.00?

A. Yes, there is another check of \$2,500.00 that went into Hersh and Sebastian.

Mr. Fink: May the record show that all the documents which I have exhibited to the witness have been previously [24] exhibited to counsel for the government, your Honor.

The Witness: That is the check, yes, sir.

Q. (By Mr. Fink): Do you recognize this check? A. That is right.

Q. This is your signature?

A. That is right.

Q. Whose account is this check drawn on?

A. H. Koch & Sons.

Mr. Fink: May we offer this as plaintiff's next in order, your Honor?

The Court: No. 8.

(The check referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 8.)

Q. (By Mr. Fink): Mr. Koch, this transaction that we have been discussing occurred in the year 1946, a little over 10 years ago. Do you purport at this time, 10 years later, to have all the documents, all the memorandums involved in this transaction?

A. I can't say that I have all of them.

Q. You do have some of them?

(Testimony of Maurice P. Koch.)

A. That is right, sir.

Mr. Fink: Your Honor, with regard to the next exhibit that I intend to show to the witness, which is a letter dated July 31, 1946, addressed by the witness to David Hersh, we have both the copy, which I represent was taken from the [25] witness' files, as well as the original letter which was sent out. Counsel has stipulated with me that the original letter was taken from the files of Beacon Pictures, and it was received by Mr. Hersh in Los Angeles, is that correct, counsel?

Mr. Gillard: That is correct.

Q. (By Mr. Fink): Mr. Koch, I will show you a letter of July 31, 1946, on the letterhead of H. Koch & Sons. It purports to be your signature.

A. That is right.

Q. Did you write this letter?

A. Yes, sir.

Q. You sent it to Mr. Hersh?

A. Yes.

Mr. Fink: I offer this as plaintiffs' next in order, your Honor.

Mr. Gillard: No objection.

The Court: Exhibit No. 9.

(The letter referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 9.)

Q. (By Mr. Fink): I will show you here a telegram addressed to Maurie P. Koch and purporting to be sent by David Hersh. Did you receive

(Testimony of Maurice P. Koch.)

this telegram? A. That is right.

Mr. Fink: May I offer this in evidence as plaintiffs' next in order? [26]

Mr. Gillard: No objection.

The Court: Exhibit 10.

(The telegram referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 10.)

Q. (By Mr. Fink): I show you here a photostat of a check of August 5, 1946, on the account of H. Koch & Sons for \$50,000. It purports to bear the signature of Rebecca Koch on behalf of H. Koch & Sons. Is that your sister, a partner's signature? A. That is right.

Mr. Fink: I offer that as plaintiffs' next in order, your Honor.

Mr. Gillard: No objection.

The Court: Exhibit 11.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 10-A.)

The Court: To get these three documents to the attention of the jury, perhaps it would be better if you read the letter and the check and the telegram.

Mr. Fink: If I may, your Honor. Exhibit 9. Letter on the stationery of H. Koch & Sons, 73 Beale Street, San Francisco 5, addressed to David Hersh, c/o Goldwyn Studios, 1421 North Formosa Avenue, Los Angeles, California.

(Testimony of Maurice P. Koch.)

“Dear Dave:

“Dave informed me of the conversation he had with you last evening relative to the participation I am to receive [27] for the loan of certain monies to you both for use in Copacabana.

“Subsequent to the above conversation when you were up here we had agreed that I was to receive in addition to the payment of the loan one and a half to two per cent for each unit of ten thousand dollars I advanced to you both. Since you have expressed yourself with a statement to Sebastian that one and a half per cent for each ten thousand dollars advanced is the best that you can do, I must likewise, in all fairness to my people express myself. I am not asking you to compromise with me as I did with you. All I am asking for is what we originally agreed upon. Because of the arithmetic of money versus participation the one and a half per cent should be straight across. So far I have advanced to Hersh and Sebastian \$17,500.00. Of this sum Hersh and Sebastian partnership advanced to Hersh individually and Caslow individually the total sum of \$10,000.000 which they used as their contribution to Beacon Pictures, Inc. The \$7,500.00 remaining is still intact in your partnership firm account. Therefore, any participation I shall receive should be handled as follows:

“For all monies hereafter loaned to you, including the \$7,500.00 in your possession, I should receive one and one half per cent participation for

(Testimony of Maurice P. Koch.)

each \$10,000.00 unit [25] advanced, direct from United Artists, the distributor.

“On the other hand in return for the ten thousand dollars originally put up for you and Caslow I am perfectly willing to have you work out an equivalent percentage to be paid by Hersh-Sebastian partnership.

“Please let me hear from you immediately on the above. Also incorporate in the document drawn in Grupp’s office the terms mutually agreed upon and forward same to me.

“Mr. Grupp also advises me that since the security to protect any advances is not now in existence that it should be understood that I need not rely on such security but may waive the same at any time I so desire. Such waiver, however, to be in writing signed by me.

“With kindest regards, I am

“Sincerely,

“(S) MAURICE P. KOCH,

“(T) MAURICE P. KOCH.”

Mr. Fink: May I, at this time, question this witness about this document, your Honor?

The Court: You may.

Q. (By Mr. Fink): Mr. Koch, to us laymen some of these terms are not clear and I want to ask you about them. The letter says, among other things, “I must likewise in all fairness to my people express myself.” To whom do you refer when you say “my people”? [29]

A. My partners.

(Testimony of Maurice P. Koch.)

Q. You used the word "participation." What do you mean by the use of that word "participation"?

A. That is any participation in the picture, percentages of the picture with them. I was to receive certain percentages along with them for my advancement to them of the moneys.

Mr. Gillard: I move that the answer go out, if the Court please, on the ground that the definition the witness is now trying to place upon the term "participation" is inconsistent with the document itself.

The Court: The answer may remain.

Q. (By Mr. Fink): When you say here, "I should receive one and one half per cent participation for each \$10,000.00 unit advanced direct from United Artists, the distributor," what do you mean by that?

A. I felt that when United Artists would distribute the moneys, after they received moneys from the picture houses, they would have all these moneys and then distribute them to Beacon Pictures, and that they should distribute my money to me direct instead of to Beacon.

The Court: Does that mean in gross receipts?

A. That is receipts after they had deducted—that would be receipts after they had deducted their, I believe, 27 per cent for distribution. They received so much for distribution of a picture and the balance of the moneys are sent back to the [30] corporation itself that owned the picture.

(Testimony of Maurice P. Koch.)

Mr. Fink: Turning to this telegram, which appears to be a night letter with a deadline of Los Angeles, California, addressed to Murray P. Koch, Personal, care Koch and Son, 73 Beale Street, San Francisco, August 4, 1946, it reads,

“Kindly instruct David Sebastian return immediately. He bring 50,000. Will not give Beacon until properly secured. David talk Weintraub satisfies me everything will be OK. Please have utmost confidence our management and fairness to you. Will complete whatever necessary Davids return. Kindest regards. David Hersh.”

Turning to Exhibit 11, it is a check this time on the firm checks that states, “Koch and Sons,” signed “H. Koch and Sons.” Underneath that, “Rebecca Koch,” dated August 5, 1946, “Pay to the order of David A. Sebastian \$50,000.00, the sum of \$50,000.00 drawn on Pacific National Bank of San Francisco, San Francisco, California,” and in the upper left-hand corner the voucher, which is part of the check, there appear these words: “8/5. In line with understandings arrived at re Copacabana picture.”

Mr. Gillard: Is this in evidence, counsel?

Mr. Fink: Yes, it is Exhibit 11. The photostat of the reverse side of the check shows “Deposit to the account of Hersh and Sebastian and David A. Sebastian.”

Q. By the way, at or about the time of that \$50,000.00 check, [31] or shortly thereafter, did you participate in negotiations for other picture deals?

(Testimony of Maurice P. Koch.)

A. Yes, we were——

The Court: Just answer the question.

The Witness: Yes.

Q. (By Mr. Fink): Can you tell us approximately how many different deals were looked into by you over the period of the last six months of 1946?

Mr. Gillard: I object to that as vague and speculative, and calling for the opinion and conclusion of the witness.

The Court: I think in view of the objection he would have to give the individual contacts.

Q. (By Mr. Fink): I show you here a letter on the letterhead of Beacon Pictures, signed Charles Weintraub, of September 9, 1946, and ask you if you are familiar with that letter. A. Yes.

Q. Do you know Charles Weintraub?

A. Yes, I do

Q. How long have you known him?

A. I have known Charles Weintraub for about 25 or 26 years.

Q. Do you recognize his signature?

A. Yes.

Q. This letter has attached to it a document which purports to be a typewritten memo of August 6, 1946. Did this matter come to your attention? [32]

A. Yes, sir, with a lot of other matters.

Mr. Fink: I offer this as plaintiffs' next in order, your Honor.

Mr. Gillard: I will object to this as being incompetent and immaterial, concerning the activities

(Testimony of Maurice P. Koch.)

of the Beacon Pictures Corporation, which has nothing to do with this individual, who is not even a stockholder or director of that corporation, and even if he were a stockholder or director, the business of the corporation would not be his business as an individual, as a partner of H. Koch & Sons.

Mr. Fink: I would have some additional questions to ask the witness on this subject, your Honor, in view of the objection counsel has made.

Q. Mr. Koch, will you tell us whether or not there was ever any discussions to the effect that a picture deal called the "Long November" would ever be a part of the Beacon Picture setup?

Mr. Gillard: Objected to as incompetent, irrelevant and immaterial. That corporation's business is not the business of this individual.

The Court: The objection may be sustained.

Q. (By Mr. Fink): Mr. Koch, on or about the year 1946 and the year 1947, which is in question in this trial, were you familiar with the practice which generally prevailed in the independent picture business with regard to the use of [33] corporations?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection may be sustained.

Q. (By Mr. Fink): Can you tell us, Mr. Koch, whether or not the picture or the proposed picture, "The Long November," whether that had anything to do with Beacon Pictures Corporation?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

(Testimony of Maurice P. Koch.)

The Court: I will permit him to answer that.

The Witness: That was——

The Court: Just answer the question.

Mr. Fink: Did it have anything to do with Beacon Pictures?

A. Some of the people in Beacon Pictures.

Q. You mean some of the same people were in "The Long November" deal who were in the Beacon Pictures deal? A. That is right, sir.

Q. Did the deal "The Long November," was it ever planned for Beacon Pictures Corporation or was it planned for some other setup?

A. That was planned for some other setup.

Mr. Fink: We would like to offer the exhibit, your Honor, that pertains to this "Long November" transaction merely to show the activity at that time. [34]

Mr. Gillard: If your Honor please, I will renew my objection. The idea of trying to prove that this taxpayer was involved in the business of financing motion picture productions by virtue of the activities of everybody else in Hollywood with reference to other matters is not a relevant subject for us to go into.

The Court: The objection may be sustained.

Q. (By Mr. Fink): Let us put it this way, Mr. Koch: In the year 1946, how much of your time did you devote to the promotion and financing of motion picture ventures?

A. About a third of my time.

(Testimony of Maurice P. Koch.)

Q. On how many occasions did you go to Hollywood? A. Oh, innumerable occasions.

Q. What was the longest period of time you stayed there at any one stretch solely for picture work? A. A little better than three weeks.

Q. When was that?

A. That was in 1946, the latter part of 1946.

Q. Do you recall when the actual production, that is, the actual photography of the picture "Copacabana" started?

A. It was the latter part of 1946. I can't tell you exactly.

Q. Were you there at the time? A. Yes.

Q. How long had you been there continuously in connection with the production of that film prior to the day that the [35] cameras turned?

A. About three weeks or better.

Q. This was at Goldwyn Studios, was it?

A. Yes, sir.

Q. By the way, does Goldwyn Studios make their studios available for lease or rental to so-called independent productions?

A. Not promiscuously.

Q. Do you know whether or not arrangements had been made for the use of their facilities for the picture "Copacabana"? A. Yes, sir.

Q. By the way, during this three weeks' time which you were there, prior to the time the photography of this film started, can you tell us in a general short statement what you did? I do not want you to give us the details of the three weeks of

(Testimony of Maurice P. Koch.)

work, but in a general way what did you do during that period of time?

A. Well, I came down there on a call from Dave Hersh. They told me they were in a lot of trouble down there and they thought I had better come down. Perhaps I could possibly help them, straighten them out. I got down to Sam Goldwyn's studios. They had used up——

Q. Not what had happened, just what you did.

A. They were in trouble. They had used up all the preproduction money. The bank would not come forth with their money. They owed money to the help, to the musicians, to the [36] costume makers, and a strike was threatened at the studio that would have closed down Sam Coslow.

Q. Coslow or Goldwyn?

A. Sam Goldwyn Studios. The bank wouldn't put up their money. The bank reneged on some \$700,000.00, and since the Bank of America reneged, Standard Capital reneged along with them, and they had all the members of the corporation down there, sitting there with their hands on their heads and didn't know what to do, and I went in there. I called Max Fink on the phone, called him down there that night, and I told him to sue the Bank of America for a million dollars. We had a letter from the Bank of America stating that if we had all of the things that were necessary——

Q. May I stop you at this point, Mr. Koch.

A. Yes.

Q. I will show you here, Mr. Koch, a letter on

(Testimony of Maurice P. Koch.)

the letterhead of the Bank of America dated September 25, 1946, addressed to Mr. David Hersh. It purports to bear the signature of Bernard Giannini.

A. That is right. That was the letter—that was the basis upon which I was going to sue the Bank of America for a million dollars.

Mr. Fink: May I offer this letter in evidence, your Honor, as plaintiffs' next in order, and I should like to read it to the jury for the record, if I may. [37]

The Court: Any objection, counsel?

Mr. Gillard: No objection.

(The document referred to was thereupon marked Plaintiffs' Exhibit 11 and was read to the jury as follows:)

“Bank of America

“National Trust and Savings Association

“Los Angeles Main Office

“Los Angeles, California,

“September 25, 1946.

“Mr. David Hirsch,

“1041 North Formosa,

“Los Angeles 46, California.

“Re: Beacon Films, Inc.,

(Copa Cabana).

“Dear Mr. Hirsch:

“This Bank is prepared to enter into its usual form of Mortgage, Pledge and Assignment whereunder we are to lend the above-named corporation for the production of the pictured entitled “Copa

(Testimony of Maurice P. Koch.)

Cabana," to cost not in excess of \$1,100,000.00, the sum, whichever is less, of \$715,000.00 or sixty-five per cent of the negative cost of said picture with interest at the rate of five per cent per annum, based upon our understanding of the following pertinent facts:

"1. Said picture shall be produced at the Goldwyn Studios and will be released for distribution under an agreement with United Artists Corporation [38] satisfactory to the bank, and shall provide for a graduated distribution fee as follows:

Twenty-five per cent of the gross receipts until the negative cost is recovered or recouped; thereafter twenty-seven and one-half per cent of the gross receipts derived from domestic territory; thirty per cent from England; fifty per cent from South America; and thirty-seven and one-half per cent from Australia.

2. The producer shall be Sam Coslow and the director shall be Al Green. The cast shall feature and include Groucho Marx, Carmen Miranda, Steve Cochran, Gloria Jean and Andy Russell. The corporation shall engage the services of a controller or financial officer satisfactory to the bank and production supervision acceptable to the bank shall be provided.

3. The budget of the estimated production cost, the shooting schedule, the completion date, the borrowing period and the release date shall meet with the bank's approval.

4. Standard Capital will advance the sum of not

(Testimony of Maurice P. Koch.)

less than fifteen per cent of the negative cost toward the production and completion of the [39] picture, and will defer and subordinate its loans or advances to the bank's loans.

5. The remaining financing shall be made up of cash and deferments of compensation for services by the producer, director and principals of the cast.

6. Standard Capital will execute an unconditional Guaranty of Completion satisfactory to the bank, and will deposit as security for said guaranty an amount equal to at least fifteen per cent of the negative cost but not less than \$155,000.00.

“Yours Very Truly,

(s) “BERNARD GIANNINI,

(t) “BERNARD GIANNINI,

Vice President.”

Did you engage in any conferences with these financial institutions, that is, either Bank of America or Standard Capital during that three-weeks period? A. I had you do that, Mr. Fink.

Q. Did you attend to the financial planning at the studio itself? A. Yes.

Q. Was this bank loan made?

A. Yes, sir.

Q. Was the Standard Capital loan made?

A. Yes, sir. [40]

Q. Were the deferments of compensation obtained with regard to Groucho Marx and Carmen Miranda? A. That is right.

Q. How much do they amount to, by the way?

(Testimony of Maurice P. Koch.)

A. Grouncho Marx was around \$100,000.00 or better, and I think Carmen Miranda was about \$50,000.00

Q. Mr. Koch, after you sent that first \$50,000.00, did you receive a note? A. Yes, sir.

Q. I show you here a note bearing date of August 31, 1946, and I will ask you if this is a photostat of a note that you received.

A. That is right.

Mr. Fink: May I offer this as plaintiffs' next in order, your Honor?

Mr. Gillard: No objection.

(Thereupon the document referred to was received in evidence and marked Plaintiffs' Exhibit 12.)

Q. (By Mr. Fink): After you advanced that first \$50,000.00 were there additional funds required for the preproduction of the picture "Copacabana"? A. Yes, sir.

Q. Did you advance some additional moneys?

A. Yes, sir.

Q. I will show you here what purports to be a check of [41] October 26, I believe, 1946, made payable to David Sebastian, signed by H. Koch & Sons by Rebecca Koch, that is, your sister, and partner you told us about, is that correct?

A. That is right.

Q. Is that her signature?

A. Yes, sir.

Q. The check is for \$30,000.00.

(Testimony of Maurice P. Koch.)

A. That is right.

Mr. Fink: I offer this as plaintiffs' exhibit next in order, your Honor.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 13.)

Mr. Gillard: No objection.

Q. (By Mr. Fink): With regard to that \$30,000.00, did you receive a note?

A. Yes, sir.

Q. I show you here what purports to be a note of October 17, 1946, Beacon Pictures Corporation.

A. That is right.

Q. This is a photostat of the note that you received? A. That is right.

Mr. Fink: I offer this as plaintiffs' next in order, note of October 17, 1946, for \$30,000.00.

Mr. Gillard: No objection.

(The document referred to was thereupon received in evidence [42] and marked Plaintiffs' Exhibit 14.)

Q. (By Mr. Fink): Going back a bit, Mr. Koch, to the time that you gave your first \$50,000.00 check out, did you give that in response to the telegram requesting it? A. That is right.

Q. I will show you here a letter of August 12, 1946, which purports to have the signatures of David Hersh and Dave Sebastian on that letter.

A. Yes.

(Testimony of Maurice P. Koch.)

Mr. Fink: May I offer this as plaintiffs' next in order?

Mr. Gillard: No objection.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 15.)

Mr. Fink: May I read this to the jury, your Honor?

The Court: Very well.

(The document was read as follows:)

“Beacon Pictures Corporation

“August 12, 1946.

“Mr. Murray P. Koch,

“2224 Lake Street,

“San Francisco, California.

“Dear Murray:

“I am pleased to inform you that David Sebastian and myself have just concluded all negotiations necessary to complete our deal for the money from you to us to Beacon. We have arrived at a formula of 1.725 per unit of 10,000 [43] each, which will make a total of 8.625 for the \$50,000.00 which Dave brought back with him.

“The \$10,000 originally advanced to Dave Sebastian and subsequently turned over to me for capital investment in Beacon Pictures will be taken care of by the Hersh-Sebastian partnership interest in Beacon Pictures.

“The attorneys here are already drawing up the

(Testimony of Maurice P. Koch.)

collateral contract which should be ready in the next day or two. In the meantime, we think it advisable that we deposit the \$50,000.00 check in the account of Hersh-Sebastian for clearance, so that we can turn same over to Beacon Pictures as soon as the contract is ready. Unless you have objections to this arrangement, we will deposit this check in the Hersh-Sebastian account this next Wednesday, August 14, 1946. If there are any questions or doubts in your mind, wire us at this address to hold up the deposit.

“You will hear from us again later this week.

“Cordially,

“(s) DAVID HERSH,

“(t) DAVID HERSCH,

“(s) DAVE SEBASTIAN.”

Q. Calling your attention, Mr. Koch, to the month of August and of September, 1946, did you, during the course of that month, have discussions between yourself and Mr. Hersh, personal discussions, that is? [44]

A. Yes, sir, I had a lot of discussions with him when I was down there trying to get the money from the bank for the picture.

Mr. Gillard: I will move that the answer go out as not responsive to the question.

The Court: It may go out.

Q. (By Mr. Fink): Turning your attention to the time when you advanced the first \$50,000.00 and the time when you advanced the second, the \$30,000.00——

A. Yes.

(Testimony of Maurice P. Koch.)

Q. Did you during those times and in between those two times have personal discussions with Mr. Hersh? A. Yes, I did.

Q. Did you also have telephone conversations with him? A. A lot of them.

Q. Did you at the same times have personal discussions with Mr. Coslow? A. Yes.

Q. And with Mr. Sebastian?

A. That is right.

Q. And telephone conversations also?

A. Yes, sir.

The Court: We will take a recess at this time for ten minutes. Remember the admonition heretofore given.

(Recess.) [45]

The Court: Proceed, counsel.

Q. (By Mr. Fink): I show you here a document entitled "Agreement," bearing date of August 31, 1946, between Murray P. Koch and Beacon Pictures, a corporation, and which bears two signatures, Murray P. Koch and Beacon Pictures Corporation by David Hersh, President. Do you recognize those signatures? A. Yes, sir.

Q. Did you execute this document?

A. Right.

Q. Did you do so for yourself or on behalf of the partnership H. Koch & Sons?

A. On behalf of the partnership H. Koch & Sons.

(Testimony of Maurice P. Koch.)

Mr. Fink: May I offer this as plaintiffs' exhibit next in order, your Honor?

Mr. Gillard: No objection.

The Court: Exhibit 16.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 16.)

Q. (By Mr. Fink): Mr. Koch, at the time that you sent this additional \$30,000.00, or, rather, delivered another \$30,000.00 for the purpose of this picture, did you receive an amended agreement?

A. That is right, sir.

Q. I will show you here a document of October 17, 1946, which purports to bear your signature and that of George Frank, [46] Secretary.

A. That is right.

Q. Do you recognize those signatures?

A. Yes.

Mr. Fink: I will offer this as plaintiffs' next in order, your Honor.

The Court: Exhibit 17.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 17.)

Q. (By Mr. Fink): I show you here what purports to be a check of November 22, 1946.

A. Right.

Q. H. Koch & Sons, and underneath the signature of Maurice P. Koch. Is that your signature?

(Testimony of Maurice P. Koch.)

A. Yes.

Q. Check to Beacon Pictures Corporation.

A. That is right.

Mr. Fink: I offer this as plaintiffs' next in order, your Honor.

The Court: Exhibit 18.

(The check referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 18.)

Mr. Fink: May I read this to the jury?

The Court: All right.

Mr. Fink: Exhibit 18 is a check on the form of Bank of [47] America, South Hollywood Branch, and that has been stricken out by pencil lines. Then "Hollywood" is stricken out and "San Francisco" is written in, and it says, "San Francisco, California, November 22, 1946. Pay to the order of Beacon Pictures Corporation \$20,000.00, H. Koch & Sons, Maurice P. Koch," and then the bank appears to be Pacific National Bank of San Francisco, 11-39. Then the blue stamp at the bottom "Endorsement missing."

Q. Mr. Koch, with regard to this check for \$20,000.00 where were you when you signed this?

A. Los Angeles.

Q. Where in Los Angeles?

A. I was at the bank—I was at the Bank of America. I believe it was the Hollywood Branch there some place.

Q. And you used one of their forms to make this

(Testimony of Maurice P. Koch.)

out on? A. That is right, yes.

Q. Insofar as Beacon Pictures is concerned, did they return part of these picture funds that you had advanced in the year 1946? A. No.

Q. Was that \$20,000.00 returned?

A. Oh, yes—well, that \$20,000.00—may I explain that?

Q. Yes, if you will, please.

A. When I was down there at the time that the bank wouldn't put up—the Bank of America wouldn't put up the seven hundred [48] and some odd thousand dollars, they were in a lot of other troubles there. They hadn't paid the musicians. They had started the production of the picture. They had not paid the musicians. They had not paid the dressmakers, and the union was going to picket the studios, and they needed money for salaries in order to prevent this, and there was quite a bit of turmoil. I came down there to straighten the whole thing out, and the only way to straighten it out was to put in another \$20,000.00, pay these people off, and get the studio open until the moneys came in from the Bank of America, and the agreement I made with the boys at the Beacon Pictures Corporation was that as soon as the money came in from the bank, after we had made—remade that loan, that I was to receive the \$20,000.00 back, and they agreed to do that. So we went down there and put up \$20,000.00 immediately and saved the studio from closing up.

Q. And this \$20,000.00 was returned?

(Testimony of Maurice P. Koch.)

A. Yes, sir.

Q. Was that after the bank loan, bank money and Standard Capital money was forthcoming?

A. That is right.

Q. After that money was available for the picture, you got back the \$20,000.00?

A. That is right.

Q. And this \$20,000.00 check, was that charged to the bank [49] account of H. Koch & Sons?

A. That is on the books, yes, sir.

Q. When that money was returned, that \$20,000.00, who did it go back to?

A. H. Koch & Sons, from where it came.

Q. Was there any practice with regard to the use of your name at times instead of the name H. Koch & Sons in business transactions?

A. A lot of times.

Q. I believe that check there bears date of October 22, 1946. When would you say it was that you got that \$20,000.00 back?

A. I believe that \$20,000.00 came back about a month after we loaned it to them, approximately.

Q. That would be practically the end of 1946?

A. I think so. I mean, the records will show when it came back.

Q. I think you told us that your original discussion with regard to setting up a venture to provide pre-production funds occurred early in the year 1946. During that year, up until the end of the year 1946, did you devote your time or part of your

(Testimony of Maurice P. Koch.)

time to that venture, including the things that you have told us about?

A. Yes, I spent a lot of time trying to promote some pictures, get them together, get the stories together, the stars together, get a deal together. [50]

Q. Turning to the beginning of the year 1947, that being the year in question here, was the picture "Copacabana" then in production? Was it then being filmed?

A. Yes, I believe it was completed the first part of the year.

Q. Prior to the completion of that picture did you come to know a man named Albert E. Green?

A. Yes.

Q. What business or occupation was he in?

A. Alfred Green was the director in "Copacabana." He made "The Jolson Story." He was the director of "Disraeli."

Q. "Disraeli"?

A. "Disraeli." He is quite a producer and a director, and I got to know him quite well while we were making the picture "Copacabana."

Q. From the beginning of the year 1947 did you have any discussions with Mr. Green with regard to independent picture ventures?

A. Yes, sir. As a matter of fact, I believe we drew up some kind of a paper on that whereby we would have Mr. Green's services——

Q. Not what was in the paper. That would not be proper for you to tell us at this time, Mr. Koch, but I show you here what purports to be a copy of

(Testimony of Maurice P. Koch.)

an unsigned document and ask you if you recognize this document.

A. Yes, yes, I know what this is. [51]

Q. By the way, you have told us, I believe, that you had counsel for your partnership H. Koch & Sons here in San Francisco, Mr. Grupp. Did you have counsel in Hollywood? A. Yes, sir.

Q. Who were your attorneys in Hollywood?

A. Fink, Levinthal & Kent.

Q. Was that document prepared to your knowledge? A. By Fink, yes, sir.

Q. Was it prepared at your instructions?

A. Yes, sir.

Q. I notice that the names mentioned as parties to this document are Maurice P. Koch——

Mr. Gillard: Just a minute, counsel. If your Honor please, I object to any testimony from the document until it has been offered in evidence and the Court has passed upon it.

The Court: I take it it is a preliminary question.

Mr. Fink: Yes, it is your Honor.

Q. Maurice P. Koch, Alfred E. Green, David A. Sebastian, and Sidney Rose. Prior to the drafting of this document before you, did you have conversations with the persons whose names we have just mentioned? A. Yes, sir.

Q. Where did these conversations occur?

A. Well, they occurred at your office. They occurred, I believe, at—— [52]

Q. By “your office”——

A. The office of Fink.

(Testimony of Maurice P. Koch.)

Q. Yes.

A. Fink's office. We had lunch together. We went over to Al Green's house. We talked this thing over quite a bit. We had quite a few meetings on this.

Q. Did you have meetings as a group, that is, the names mentioned there? A. Yes.

Q. Did you have individual discussions with the persons whose names you have mentioned?

A. Yes, sir.

Q. What was the subject matter of those discussions?

A. Well, we were discussing the life of Fred Fisher. We wanted to make a story on the life of Fred Fisher and one of the names of the features, Peg O' My Heart.

Q. That is the song title, Peg O' My Heart?

A. One of his song titles, yes, sir. We were going to have all the songs in the picture, though.

Mr. Fink: I offer this as plaintiffs' next in order.

Mr. Gillard: I object to it on the ground that no foundation has been laid.

The Court: I do not think there is yet, counsel, a foundation for that.

Mr. Fink: In that regard, your Honor, this document is not included. [53]

The Court: I realize that.

Mr. Fink: It is offered for the purpose of showing the activities of the plaintiffs in the motion pic-

(Testimony of Maurice P. Koch.)

ture insofar as promotion and financing of motion pictures are concerned in the year 1947.

The Court: But there isn't any foundation for it as yet, counsel, as I see it. You may ask the witness some further questions about it.

Q. (By Mr. Fink): Mr. Koch, was this document prepared at your direction?

A. Yes, sir.

Q. Was it prepared by counsel employed by the plaintiffs in this case? A. That is right.

Q. Did you see the document after it was prepared? A. I did.

Q. Subject to the deal of the Fred Fisher story, or whatever you want to call it, working out——

A. That is right.

Q. Was this document acceptable to you?

A. Yes, sir.

Q. Was it part of the effort you put forth in connection with the business of participating in a promotion and financing of motion pictures in the year 1947? A. That is right. [54]

Q. Was it prepared in the course of that business?

A. Yes, sir.

Mr. Fink: We offer it, your Honor, as plaintiff's next in order.

Mr. Gillard: It may be the Court should look at the document even as a matter such as Mr. Fink is talking about is concerned; this document has no relation at all to the question just asked of the witness.

Mr. Fink: If I may interrupt, your Honor——

The Court: Were you an officer or director of the corporation known as Amabssador Productions?

(Testimony of Maurice P. Koch.)

A. At one time I owned all the stock in Ambassador Productions.

Q. Did you own it at or about the time that this agreement was prepared?

A. No, sir. We were talking about——

Q. Just answer my question. A. No, sir.

Q. At the time this agreement was prepared, were you an officer or director of the corporation?

A. No, sir.

Q. Were you a stockholder in that corporation?

A. At the present time, no. I was subsequent to that agreement.

Q. The agreement provides, Mr. Koch, that you are the sole stockholder of the corporation.

A. I know, but that agreement was never executed and the [55] corporation—I never put any money in the corporation for that stock.

The Court: I do not think, counsel, that there has been any foundation yet laid.

Mr. Fink: But it will probably go along with other documents.

Q. Mr. Koch, was there a corporation called Ambassador Productions, Inc., organized?

Mr. Gillard: I object to that as not the best evidence.

The Court: It is preliminary. I will permit it.

The Witness: Ambassador Pictures, did you say?

Q. (By Mr. Fink): Ambassador Pictures or Ambassador Productions. Just one moment. Ambassador Productions, Inc. A. Yes, sir.

(Testimony of Maurice P. Koch.)

Q. At whose request was that corporation organized? A. Organized at my request.

Q. Did you employ counsel for that purpose?

A. Yes, sir.

Q. Who were the counsel? A. Fink.

Q. Why was that corporation organized? What was the purpose of it?

A. The purpose of that corporation was to set up a vehicle to make the picture which was the life of Fred Fisher. Subsequently it would have been called "Peg O' My Heart." [56]

Q. You told the Court, I believe, at the time this document wherein appears the names of Alfred Green, David Sebastian, Maurice P. Koch and Sidney Rose—— A. That is right.

Mr. Fink: May I have this marked for identification?

The Court: Let it be marked Exhibit 19 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit 19 for identification.)

Q. (By Mr. Fink): At the time that Exhibit 19 was prepared by your counsel and under your direction, as you told us, had you intended to organize the company Ambassador Productions, Inc.?

A. That is right.

Q. Did you intend to cause stock to be issued of that organization? A. That is right.

Q. Did you intend at that time to become the sole owner of all the shares of that corporation?

(Testimony of Maurice P. Koch.)

A. That is right.

Q. Had the shares been issued at the time this document was drafted?

A. No, no shares were issued at that time. I mean, there was no money to put up at that time.

Mr. Fink: I now offer in evidence, your Honor, the permit of the Department of Investment, State of California, the original, to Ambassador Productions, Inc., authorizing the [57] issuance of its shares of stock.

The Court: Do you contend that the shares were issued in accordance with the permit?

Mr. Fink: At a subsequent date, your Honor, yes.

The Court: They were issued?

Mr. Fink: Certain shares were issued at a subsequent date pursuant to this permit.

The Court: Exhibit 20.

(The permit referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 20.)

Q. (By Mr. Fink): Prior to the issuance of shares and the completion of the corporate setup of Ambassador Productions, Inc., Mr. Koch, did you have other discussions? A. Yes.

Q. With the same people? A. Yes.

Q. Those mentioned in Exhibit 19?

A. Al Green.

Q. Yes.

A. Yes, we had a lot of discussions. As a matter of fact, we were going to sign a contract with Al

(Testimony of Maurice P. Koch.)

Green to make six pictures and he was going to direct those pictures.

Q. Prior to the time that any stock was issued in a corporation called Ambassador Productions, Inc., did you request that an agreement of employment between Alfred E. Green and [58] Ambassador Productions be prepared? A. That is right.

Q. I will show you here what purports to be a form of employment agreement by Ambassador Productions, Inc., by Alfred E. Green, which bears date of April 28, 1947, and it does not seem to have been executed. A. That is right.

Q. Was this the document to which you have reference? A. That is it.

Q. This document was prepared in 1947. We do not expect you to remember the contents of it. Will you tell us whether you were familiar with this document at the time it was prepared in the year 1947?

A. Well, yes, I was familiar with it because we did talk about a three-year contract and six feature-length pictures, which you have right here in the first paragraph.

Q. And were the discussions which you had preliminary to the carrying through of a deal to purchase a feature picture?

A. These were preliminary, yes.

Mr. Fink: We will offer the agreement between Ambassador Productions, Inc., and Alfred E. Green, dated April 28, 1947, your Honor, and again, if we may, renew our offer of Exhibit 19 for identification.

(Testimony of Maurice P. Koch.)

Since the permit for the issuance of the shares is now in the record, I believe the matters are now tied up perhaps more closely than they were previously.

Mr. Gillard: If the Court please, Exhibit 21, which refers to the employment contract between Ambassador Productions, or whatever that corporation is, and Al Green, is the activity of a corporation which this man is no part of. It is a corporate activity and not part of the activities of this individual, and as such has no relevancy to these proceedings as to whether he was in business.

The Court: That has not been marked but I will mark that, the employment contract, Exhibit 21 for identification. The objection to it may be sustained.

(The employment contract referred to was thereupon marked Plaintiffs' Exhibit 21 for identification.)

The Court: The witness has testified to certain transactions, but I as yet see no reason to admit the documents which were unexecuted by anybody. The former ruling stands as to Exhibit 19.

Q. (By Mr. Fink): For the moment, staying with this Ambassador Productions matter, Mr. Koch, eventually were there shares of stock in that corporation?

A. There was stock issued in that corporation. Shares, I guess.

Q. To whom were the shares issued?

A. I at one time owned all the shares in the corporation.

(Testimony of Maurice P. Koch.)

Q. Were the shares originally issued to you?

A. I can't remember if they were originally issued to me. [60]

Q. Did anybody else put any money in this company except you? A. No, sir.

Q. Did anyone own any shares to your memory as long as you were active in that company?

A. No, sir.

Q. So far as your memory serves you, were you the only stockholder of that corporation?

A. Until I sold it, yes.

Q. You sold it in what year, Mr. Koch?

A. I think it was in 1948.

Q. That was after the year 1947, would you say, in this case?

A. Yes. It might have been—I doubt it. The record will speak for itself. I sold that to Jack Chertok, and I think there must be a record some place along the lines of the date that I sold it to him, if that is important.

Q. Going back for a moment to this picture "Copacabana", I will show you here a document entitled "Mortgage". It bears date of February 7, 1947. It purports to bear the signature of Beacon Pictures by David Hersh and Charles Weintraub, as President and Assistant Secretary, respectively. Do you recognize those signatures? A. Yes, sir.

Q. It runs in favor of or to Murray P. Koch. By the way, do you sometimes use the name "Murray" instead of "Maurice"?

(Testimony of Maurice P. Koch.)

A. That happens to be my nickname, and I have had that ever [61] since I was in grammar school, and when I got in business about 30 years ago, they have used both of them, and I don't know whether I am coming or going.

Mr. Fink: We offer the mortgage of February 7, 1947, as plaintiffs' exhibit next in order.

Mr. Gillard: No objection.

The Court: It may be admitted as Exhibit 22.

(The mortgage referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 22.)

Mr. Fink: May the record show with regard to all these documents that they have been exhibited first to counsel for the defendant, your Honor?

Mr. Gillard: That is correct.

Q. (By Mr. Fink): Mr. Koch, in connection with the Al Green deal—we will call it that for lack of a better name—was that transaction fully discussed between you and Mr. Green, Mr. Seabastian and Mr. Rose before the formation or before the activation of Ambassador Pictures? A. Yes, sir.

Q. Had you arrived at your exact thinking with these people prior to the activation of that corporation? A. That is right, we did.

Q. Was the document Exhibit 19 prepared at your direction prior to the activation of that corporation?

A. May I see that document? Yes. This was drawn up before [62] the corporation was formed. I believe it was. It must have been.

(Testimony of Maurice P. Koch.)

Mr. Fink: I offer in evidence a certified copy of the Articles of Incorporation of Ambassador Productions, Inc.

The Court: Exhibit 23.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 23.)

Mr. Fink: The filing stamp of the Secretary of State is March 20, 1947, your Honor.

Q. Mr. Koch, I show you here a copy of the Articles of Incorporation of Ambassador Productions, Inc., which seems to have been filed in the Secretary of State's office, Mr. Jordan's office, March 20, 1947, and I show you the incorporators of this corporation who signed these papers. The first name appears to be Cyrus Levinthal. Who is Cyrus Levinthal?

A. One of your partners.

Q. A lawyer? A. Lawyer, yes.

Q. In the office employed by you to set up this corporation? A. Yes.

Q. The name is Max Fink. A. Right.

Q. The same answer? A. Right.

Q. Leon E. Kent. [63] A. Yes.

Q. Raymond Hartmann. A. Right.

Q. Grace Gordon. A. That is right.

Q. Was she a lawyer?

A. No, she was the secretary.

Q. I see the acknowledgement is by Jerome D. Ralston. Who is he?

(Testimony of Maurice P. Koch.)

A. He is one of your partners and also a notary public.

Q. Do any of these people, the names that you have just called off, which appear to be all the incorporators, and all those persons whose names appear on these Articles of Incorporation appear to be in the law office of Fink, Ralston, Levinthal & Kent?

A. That is right.

Q. When you testified a moment ago I asked you certain questions in which I used the word "activation" of the corporation. Do you understand the difference between activating a corporation and merely organizing it or filing articles? A. No.

Q. Let me explain it this way. The filing of the articles for the purpose of my questions I will assume to be the mere skeleton organization. Activating it is when you put some meat on it, put some money into it. I will ask you, sir, at [64] the time these documents Exhibit 19 and Exhibit 21 were prepared, and at the time that you had these discussions with Mr. Green, Mr. Rose and Mr. Sebastian, that you told us about, had this corporation been set up to the extent of having any assets or liabilities?

A. No, it had not.

Q. You mentioned a few moments ago, Mr. Koch, that you had certain business dealings with a man named Chertok. A. Yes, sir.

Q. When did you first meet him?

A. I met Jack Chertok, it must have been the early part of 1947.

(Testimony of Maurice P. Koch.)

Q. What was the occasion for your getting together with him, meeting him?

A. I met him—I was interested in producing—not producing but promoting and financing some motion pictures, and he seemed to be quite a man in his business. He was with MGM for 25 years. He had made a lot of pictures. He had had a lot of Oscars and I got to like him very much. I liked his ability. I liked what he knew about the picture business.

Q. Did you have discussions with him with regard to motion picture projects?

A. Yes, sir. We got into quite a discussion on that and decided to make one big picture and a lot of little pictures.

Mr. Gillard: I am going to ask that the answer go out, if [65] the Court please. I move to strike it out. There is no foundation laid for the conversation.

The Court: The answer may go out.

Q. (By Mr. Fink): Mr. Koch, did you have the discussion with Mr. Chertok with regard to making a feature picture? A. Yes, sir.

Q. Where did that conversation occur?

A. That conversation occurred at the Friar's Club in Hollywood, California.

Q. Did you have more than one discussion with him upon that subject? A. Yes, sir.

Q. Did they occur in San Francisco, Los Angeles, or where?

A. No, we met at his house and another time we met him in San Francisco.

Q. In connection with this discussion in regard to

(Testimony of Maurice P. Koch.)

making a feature picture, was anything done about it? A. Yes, sir.

Q. What was done?

A. Jack went back East. He was to find a good story. He found one book there called, "Hill of the Hawk."

Q. Was this a published book?

A. Yes, that book was written by Scott O'Dell.

Q. Did you at that time read the book?

A. Yes, sir. [66]

Q. Did members of your partnership other than yourself read that book?

A. Everybody read it, yes, sir.

Q. After reading the book, what was done?

A. We thought it was a pretty good story, and we thought we ought to make the picture, and we started proceedings—that is when we met down there with Jack Chertok. You were present when I gave you the first check for \$7,000.00 as a down payment for the rights to the story from Scott O'Dell.

Q. At the same time that you were active in connection with the Hill of the Hawk, did you discuss the making of other pictures? A. Yes, sir.

Q. With those with Mr. Chertok?

A. We discussed a lot of B series pictures with Mr. Chertok, and that is what we discussed with Mr. Chertok at the time. Subsequent to the B pictures and The Hill of the Hawk, we went into the Government training pictures with Jack Chertok.

Q. All of this occurred in the year 1947, the year in question?

(Testimony of Maurice P. Koch.)

A. Yes, sir, we put a lot of money into that one. As a matter of fact, we promoted a million dollars for Jack Chertok on that training picture.

Mr. Fink: I offer in evidence as plaintiffs' exhibit next in order a letter from Annie Laurie Williams, October 17, 1946, addressed to Max Fink, re Hill of the Hawk by Scott O'Dell. [67] We have a stipulation from counsel that this letter was received by me or by my office shortly after the date which it bears.

Mr. Gillard: I will object to it, if the Court please, on the ground it is hearsay. It does not relate to the activities of this witness or his financial transactions.

Mr. Fink: Your Honor, this witness' activities are carried on by counsel, his agents, and by his lawyers.

The Court: Did you have any agreement with Mr. Chertok, written agreement?

The Witness: I had the stock of Ambassador Pictures Corporation—yes, I had notes.

The Court: Did you have any agreement with Mr. Chertok?

A. On Hill of the Hawk?

Q. Yes.

A. I might have. I don't remember. I might have some agreement with him.

Q. Did you make any agreement to produce any picture with Mr. Chertok?

A. Well, I made an agreement with him to finance and help promote money to make these pictures. They

(Testimony of Maurice P. Koch.)

were going to produce the pictures. I was going to finance money to promote the picture.

Q. What do you mean by that?

A. Well, when a picture is made you definitely have to have a [68] bank, money——

Q. You went through all that earlier today.

A. We have the same story here, Judge.

Q. What were you going to do in this matter?

A. Use it for pre-production. This particular money was for the payment—was—we were paying for the picture rights of the story by Scott O'Dell. That was *Hill of the Hawk*.

Q. Did you buy those rights? A. Yes, sir.

Q. Who?

A. Well, Ambassador Pictures bought them and I owned Ambassador Pictures. Is that correct, Mr. Fink?

The Court: Counsel, this seems to be a letter from somebody in New York which I, at the moment, cannot see the foundation for. I will mark it for identification.

Mr. Fink: May I be heard, your Honor?

The Court: That is 10/17/46. Exhibit 24 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit 24 for identification.)

Q. (By Mr. Fink): Mr. Koch, at the time that you had your discussion and the negotiations that led up to the initial investigation into the purchase of the literary property called "*Hill of the Hawk*,"

(Testimony of Maurice P. Koch.)

was there any particular corporation mentioned? Did the corporation name of any kind enter into your [69] discussions? A. No, sir.

Q. You just told the Court that eventually Ambassador Productions took in its name the title to this literary property "Hill of the Hawk."

A. You mean before I put up money or after? I made the check out to Ambassador Pictures. I knew that Ambassador Pictures was going to buy Hill of the Hawk.

Q. When did you know that?

A. When we had lunch at the Frier's Club, and I gave you the check for \$7,000.00.

Q. Is that the first time you decided who was going to own that?

A. I knew we were going to use the corporation but I didn't know which one. I mean, I can't remember. That is 10 years ago. But I do know we made the checks out to Ambassador Pictures Corporation and you gave me all the stock of Ambassador Pictures Corporation as security for the money. That I do know.

Q. When did you say these discussions occurred between you and Mr. Chertok with regard to the making of a feature picture? I think you told us it preceded his trip to New York to find a story.

A. That is right.

Q. When did these first discussions occur?

A. These first discussions occurred the early part of 1947. [70]

Q. Were you advised whether or not Mr. Chertok made the trip to New York?

(Testimony of Maurice P. Koch.)

A. I knew he went to New York.

Mr. Gillard: I object to that as calling for the hearsay statement of the witness.

The Court: Overruled.

Q. (By Mr. Fink): Will you answer, please?

A. I knew he went to New York. I talked to him in New York.

Q. When was it, would you say, that you and your partners read the book "Hill of the Hawk" by Scott O'Dell?

A. That would be—that was sometime in 1947.

Q. By the way, what was the subject matter of this book? What was the nature of the story?

A. It was a beautiful story of early California days.

Q. At the time you first talked with Mr. Chertok about going to New York, at the time he went to New York, at the time you read the book "Hill of the Hawk"—during any of those times was Ambassador Productions or any other corporation name mentioned in your discussions?

A. Ambassador was mentioned. Yes. Yes, at the time we started to put money into Ambassador Productions, we knew we would need a lot of money for pre-production, and we possibly would not have enough of our own money, so we decided to form a corporation called Producers' Finance Corporation to finance money to promote and to produce pictures, to obtain money. [71]

Mr. Fink: I will offer in evidence, your Honor, as plaintiffs' next in order the Articles of Incorporation of Producers' Finance Corporation, which

(Testimony of Maurice P. Koch.)

bears date October 20, 1947, in accordance with the certification of the Secretary of State of California.

Mr. Gillard: No objection.

The Court: Exhibit 25.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 25.)

Q. (By Mr. Fink): Mr. Koch, turning to Exhibit 25, I will show you here the Articles of Incorporation of Producers Finance Corporation, and it appears to bear the names of three incorporators only.

A. Yes.

Q. Maurice P. Koch, San Francisco, California. That is you. A. That is right.

Q. Morris M. Grupp, San Francisco, California. Who was that?

A. My San Francisco attorney.

Q. Was he acting at that time as the attorney for the partnership of H. Koch & Sons?

A. That is right.

Q. The third name and last name is Bernice E. Phillips. Who was that?

A. That was Mr. Grupp's secretary.

Q. Was this corporation, Producers' Finance Corporation, [72] organized by the attorney for H. Koch & Sons in San Francisco, Mr. Grupp and his office? A. Yes, sir.

Q. Was he at that time acting for H. Koch & sons? A. Yes, sir.

Q. Did you sign those papers acting on behalf of

(Testimony of Maurice P. Koch.)

the partnership? A. That is right, sir.

Q. Will you tell us what was the purpose of that corporation?

A. That corporation was formed to obtain money from outside sources as well as our own to finance and promote pictures.

The Court: Is this a convenient place to take a recess?

Mr. Fink: Yes, your Honor.

The Court: We will take a recess at this time until 10:00 a.m. tomorrow morning. You will remember the admonition heretofore given you about not discussing the case, forming or expressing an opinion about it until it is finally submitted. 10:00 a.m. tomorrow morning. [73]

November 27, 1956—10:00 o'Clock A.M.

Mr. Gillard: If the Court please, may the defense have an order excluding witnesses from the courtroom? Yesterday I forgot to ask it.

The Court: It is a little late, counsel.

Mr. Gillard: I recognize that, your Honor.

The Court: Any objection to it?

Mr. Fink: The only two witnesses in the courtroom other than the witness on the witness stand are both from out of town and have nothing to do except to be in the courtroom.

The Court: All witnesses in the case of Koch vs. United States may retire from the courtroom. There is a witness room immediately across the hall.

MAURICE P. KOCH

a plaintiff herein, being previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Fink:

Q. Mr. Koch, calling your attention to on or about the month of September, approximately that time, in the year 1947, the year in question here, were there any negotiations with Monogram Pictures Corporation? A. Yes.

Q. What was that discussion about?

A. We negotiated with Monogram Pictures Corporation to produce [74] a lot of B pictures.

Q. What do you mean by a "B picture"?

A. A B picture would be cheaper picture than a big picture. The stars would be of lesser importance, the cost of the pictures would be smaller, and the expenses of making the picture would be a whole lot less than an A picture.

Q. Did you have counsel employed at that time for H. Koch & Sons with respect to the Monogram Pictures deal? A. Yes, sir.

Mr. Gillard: Counsel, may we have the "we" identified? He said "we" negotiated. May we find out who "we" was?

Q. (By Mr. Fink): Who was the "we" to whom you have reference?

A. Well, I negotiated for H. Koch & Sons and Mr. Fink was in my employ and was part of the negotiations.

(Testimony of Maurice P. Koch.)

Q. I will show you here what is called a production distribution agreement. Have you seen this document before? A. Yes, sir.

Q. Do you recall approximately when it was that you first saw it?

A. I first saw this document while we were in Los Angeles there before the—this was somewhere around the time we were talking about Hill of the Hawk.

Mr. Fink: We have a stipulation, your Honor, that the letter of September 25, 1947, from Monogram Pictures Corporation was received by Max Fink. We offer the letter together with a [75] contract or document just identified as plaintiffs' next in order.

The Court: I do not understand what you are doing, counsel. Are you offering it in evidence?

Mr. Fink: Yes, your Honor.

The Court: That is what I did not hear.

Mr. Fink: We are offering the contract, together with the transmittal letter as one exhibit.

Mr. Gillard: I object to it as no foundation having been laid.

The Court: I am inclined to think that the objection is good, counsel.

Mr. Fink: I hesitate to call myself as a witness, your Honor, to identify a letter which obviously I received.

The Court: That is not the point of the objection, I do not believe. It was stipulated that you received the letter.

(Testimony of Maurice P. Koch.)

Mr. Fink: And the contract with it. I might note for the Court's attention the top of this letter has the technical staff of the Government's stamp on it, this same document having been in their possession for some years.

The Court: I take it that part is not questioned, that you received the letter and the contract. Whether it is admissible in evidence is the objection that is made.

Mr. Fink: We urge the admission of it upon the grounds that this voluminous contract for the production and distribution [76] of films shows the activity of the witness in the motion picture business.

The Court: I do not believe there is sufficient evidence to justify its admission yet, counsel. The objection may be sustained.

Mr. Fink: May we have it marked as plaintiffs' next in order?

The Court: 26 for identification.

(The document referred to was thereupon marked Plaintiffs' Exhibit 26 for identification.)

Mr. Fink: The letter and the contract are one exhibit, your Honor.

The Court: All right.

Q. (By Mr. Fink): Mr. Koch, are you familiar with the name Harry Fox or were you familiar with it in the year 1947? A. Yes.

Q. What was the nature of Harry Fox's activities in connection with the amusement business?

(Testimony of Maurice P. Koch.)

A. Harry Fox was one of the head people in the United States with relation to songs. He was situated in New York and he would find out for you or negotiate for you to find out if there were any plagiarisms on the songs or whether the songs were owned by the people that were supposed to have owned the songs, so that you would not run into too much difficulty if you would buy a series of songs or a play with the songs in them, [77] of having somebody sue you after you got involved in making the picture.

Q. Were there any negotiations conducted in your behalf—when I say “your behalf,” I have reference to H. Koch & Sons—many times I have asked things that you did, and I want you to know each time I have reference to H. Koch & Sons—did you or anyone in your behalf negotiate with Harry Fox for the acquisition of musical properties or songs for motion pictures?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial, whether anybody acted on his behalf.

Mr. Fink: A person may act through agents, attorneys and others employed by him with the same effect as if they acted for themselves.

The Court: That is true. It calls for a conculsion, counsel. If you have something to prove, get to the point and prove it. This is too general.

Q. (By Mr. Fink): I show you here, Mr. Koch, a letter of July 3, 1947, a letter of September 29, 1947, addressed purportedly by Harry Fox to Max Fink in each instance, and ask you if at the times of these

(Testimony of Maurice P. Koch.)

letters you know whether or not communications were being had with Harry Fox? A. Yes, sir.

Q. Agent and trustee? A. Yes, sir.

Q. Will you read these letters and tell me whether or not at [78] or about the date of those letters you were familiar with the general activity therein described?

A. Yes, this letter is from Harry Fox to Max Fink——

Q. That is all right. You can't tell us what is in the letter.

A. Oh, you asked me to read the letter.

Q. Read it to yourself. That is what I had in mind.

A. Yes, I am familiar with that letter. I am very familiar with that letter.

Mr. Fink: I will offer the letter of July 3, 1947, and the letter of September 29, 1947, to Harry Fox, your Honor, as plaintiffs' next in order.

Mr. Gillard: Objected to on the ground no foundation has been laid.

The Court: Counsel, there isn't any foundation as yet. The answer given by this witness is whether he is familiar with these letters, period. That is all you have shown. On that basis it is not admissible. A lot of people might be familiar with it for a lot of different reasons. I do not think there is any evidence yet that would justify the admission of these letters.

Mr. Fink: Do we, therefore, have in mind the objection having been made on the ground of lack of foundation; I was wondering if that goes only to the

(Testimony of Maurice P. Koch.)

problem of establishing the signature of Harry Fox? [79]

The Court: I do not know.

Mr. Fink: There would not be any other foundational problems that I know of. You will stipulate that I received the letters, will you not?

Mr. Gillard: I will stipulate that you received the letters, yes.

Mr. Fink: I am somewhat apprehensive about this objection, your Honor, because since I am apparently trying this law suit I do not want to become a witness. I can only tell your Honor——

The Court: That may be something that you do not desire to do, but this may become necessary for you. At the moment I can't see the basis for the admission of these letters in evidence. It may be you can establish it. I do not believe you have as yet. You might take your files, and he might have looked at your files and be familiar with them, and all your files would be admissible in evidence on that basis?

Mr. Fink: Your Honor, this has specific reference to the things he has testified to.

The Court: You have not developed from this witness anything that discloses that, counsel. I am not going to go any further with it.

Q. (By Mr. Fink): Mr. Koch, in order to clarify our record here, the letter of July 3, 1947, purports to be on the stationery of Harry Fox. It says, "In re: the story of Fred Fisher." [80]

A. That is right.

Q. On July 3, 1947, were you interested in a pro-

(Testimony of Maurice P. Koch.)

ject which I think you told us about yesterday called "The Story of Fred Fisher"? A. Yes, sir.

Q. Were you interested at that time for the purpose of a motion picture venture in acquiring certain musical rights or song rights and live story rights with regard to Fred Fisher? A. Yes, sir.

Q. At that time what was being done to acquire those rights, if anything?

Mr. Gillard: I object to that as vague and indefinite.

The Court: What did you do, Mr. Koch? Put the question that way?

A. I instructed Mr. Fink to get all the rights to the Fred Fisher story so that we could make a picture of it, and in doing this he had to go through the proper channels to see that everything was tied up properly so that no one could come back at us later and tell us that they owned a part of these songs or a part of this story, because it was an estate, and after you make a picture you could be sued for everything if someone else had an interest in it. And this is Mr. Fox's business of tying these things down.

A Juror: Your Honor, could the gentleman at the desk speak a little louder? I can never seem to get your remarks and I would like to hear what you say. [81]

Mr. Gillard: Thank you. I shall try to do that.

Mr. Fink: We offer this letter of July 3, 1947, on the letterhead of Harry Fox as plaintiffs' next in order.

Mr. Gillard: Same objection, and the further ob-

(Testimony of Maurice P. Koch.)

jection that there is no showing that Harry Fox was the agent employed or in any other fashion authorized to act on behalf of H. Koch & Sons.

The Court: I will admit the letter, there being no question about the fact that the letter was received by the person to whom it is addressed. Is that right?

Mr. Fink: Yes, your Honor.

The Court: Is that right, counsel?

Mr. Gillard: I have so stipulated, that is was received by Mr. Fink.

The Court: It may be marked Exhibit 27.

(The letter referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 27.)

Q. (By Mr. Fink): Mr. Koch, I will show you a letter on what purports to be the stationary of Harry Fox, agent and trustee, dated September 29, 1947, which purports to also relate to the Fred Fisher matter. A. That is right.

Q. On or about the date of September 29, 1947, was Max Fink still acting as your attorney?

A. Yes, sir. [82]

Q. Was he acting in connection with the matter of clearing title to Fred Fisher's songs and story?

A. That is right, sir.

Mr. Fink: May I offer this as plaintiffs' exhibit next in order, your Honor?

Mr. Gillard: Same objection.

The Court: What is it?

Mr. Gillard: No foundation has been laid, and that there is no indication that Harry Fox was an

(Testimony of Maurice P. Koch.)

agent employed or otherwise authorized to act for or on behalf of H. Koch & Sons.

Mr. Fink: It is not contended that Harry Fox was acting for H. Koch & Sons. He was acting for the Fishers, if for anyone. The letters are offered to show the activities that went on, your Honor.

The Court: Is it stipulated that the letter was received by Max Fink? You say there is no foundation. I don't know what you mean by no foundation, counsel. Do you mean it is not signed by Fox, was not received by Fink?

Mr. Gillard: That is correct, your Honor. All I have stipulated to is that the letter was received by Mr. Max Fink. I have not stipulated it was signed by Harry Fox, on his behalf, or by anybody authorized to do so on behalf of H. Koch & Sons.

The Court: It may be admitted as Exhibit 28.

(The document referred to was thereupon received in evidence and marked Plaintiffs Exhibit 28.) [83]

Q. (By Mr. Fink): Mr. Koch, we exhibited to you a while ago a matter relating to Monogram Pictures, Exhibit 26, I believe, for identification at this time. I called your attention to September 25, 1947, at that time. And now I will ask you if on or about November 19, 1947, your negotiations with Monogram Pictures Corporation were still in progress?

A. We were in a lot of other activities then, and they were still writing us, trying to get us——

Q. Not what they were writing you; I do not be-

(Testimony of Maurice P. Koch.)

lieve that you would have the right to tell us the contents of any document, Mr. Koch. Just tell us what was happening. Were there revisions being made to contracts? A. Yes.

Q. And negotiations were being conducted over a period of months? A. That is right.

Q. I will show you here a letter of November 19, 1947, and I will ask you if you will read that letter to yourself, please.

A. Yes, I have seen that letter.

Q. On the date that this letter bears, November 19, 1947, were these negotiations and revisions still going on with Monogram Pictures Corporation?

A. They were.

Mr. Fink: I will offer the letter of November 19, 1947, your Honor, as plaintiffs' next in order. [84]

Mr. Gillard: I will object on the ground that there is no foundation laid, if the Court please. There is no showing that Mr. Fink was acting on behalf of the witness in this connection. The evidence shows that Mr. Fink was a director of Ambassador Pictures Corporation. There is nothing to indicate that he was not acting in that capacity rather than in a capacity for H. Koch & Sons, as distinguished from any corporate activity that H. Koch & Sons was interested in.

Mr. Fink: May I be heard, your Honor?

The Court: Yes.

Mr. Fink: It is rather difficult at best to cover situations that occurred 10 years ago. I have the feeling that the introduction of these documents and

(Testimony of Maurice P. Koch.)

letters would help us revive and reconstruct this situation for the Court and the Jury, and I do believe, although each letter in and of itself may not be important, it helps to tell the story as is occurred 10 years ago.

The Court: However, I believe the objection made by the Government is good. It has not been met by the plaintiffs.

Mr. Fink: May we have it marked?

The Court: It may be marked.

Mr. Fink: We have a stipulation with regard to this letter that is was received, do we not, counsel?

Mr. Gillard: Yes.

The Court: Exhibit 29 for identification. [85]

(The document referred to was thereupon marked Plaintiffs' Exhibit 29 for identification.)

Mr. Fink: We do have a stipulation that the letter was received by our office, counsel?

Mr. Gillard: That is correct.

Mr. Fink: Thank you.

Q. In connection with acquiring the motion picture rights to the book "Hill of the Hawk" by Scott O'Dell, did you have business with Annie Laurie Williams of New York City?

A. Through you, yes.

Q. When you say "you", you have reference to Max Fink? A. That is right.

Q. Or Fink, Ralston, Levinthal and Kent?

A. That is right.

Q. What instructions did you give to your coun-

(Testimony of Maurice P. Koch.)

sel in connection with Hill of the Hawk, the purchase or acquisition of the Hill of the Hawk story and book for picture purposes?

A. I asked you to buy the picture rights of the book. I asked you to protect us against all things that might lead to legal entanglements later on when we would get into the picture, and act as my legal counsel in the matter, protect my interests.

Q. In the months of October, November and December of 1947, and all during the year 1948, did the same attorneys continue to act for you in connection with the Hill of the Hawk story?

A. Yes, sir. [86]

Q. I will ask you to look at these papers that I placed before you and tell us whether or not on the dates mentioned on these documents to your knowledge efforts were being made for the purpose of acquiring Hill of the Hawk?

A. That is right.

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Fink: I offer at this time, your Honor, copy of letter of Max Fink addressed to Annie Laurie Williams, New York. It may be a little cumbersome for our record, your Honor, but I would prefer to offer these one by one if I may. We offer first the letter of October 24, 1947.

Mr. Gillard: I object to it as no foundation having been laid.

Mr. Fink: May we have a stipulation that the

(Testimony of Maurice P. Koch.)

original was sent in accordance with the ordinary course of business?

Mr. Gillard: No.

The Court: Counsel, this witness can testify as to what he did and to what instructions he gave, what activities he had, but I do not believe through this witness you can produce evidence of what somebody else did because he doesn't know anything about it. You can ask him as to what he did, what instructions he gave, what activities he engaged in in connection with such matters as may be relevant, but I think if you [87] intend to prove the activities of some other people, you have to produce some other witnesses.

Mr. Fink: I rather expected certain stipulations, your Honor, on these routine matters. Since we do not have them——

Mr. Gillard: I am going to move that that be stricken, if the Court please.

The Court: It may go out. The statement of counsel is not evidence. It may be stricken.

Q. (By Mr. Fink): Mr. Koch, I show you here a document which bears date of December 12, 1947, entitled "Agreement" between Ambassador Pictures, Inc., as the purchaser, and Scott O'Dell as the owner, or called the owner in this agreement.

A. Yes, sir.

Q. Are you familiar with this document?

A. Yes, sir.

Q. I show you here the signature on the last

(Testimony of Maurice P. Koch.)

page of this document, Exhibit A-5, of Jack Chertok. Are you familiar with his signature?

A. Yes, sir.

Q. Is that his signature? A. It is.

Q. I will show you here the signature on page 13 of the document which precedes the exhibit we refer to and ask you if you recognize the signature that purports to be that of Jack Chertok?

A. That is right. [88]

Mr. Fink: I will offer this document as plaintiffs' next in order, your Honor, and I should like to note for the record that in the upper left-hand corner it bears the stamp of the technical staff. This document was in their possession. That is to be disregarded, I assume, for the purpose of this trial.

Mr. Gillard: I object on the ground it is incompetent, irrelevant and immaterial, and not bearing upon the issues of this case.

The Court: Counsel, I can't see the basis at the present time for the admission of this.

Mr. Fink: I was wondering, your Honor, if it would be helpful for us to discuss the law of the case in relation to these matters.

The Court: Do you desire a recess for that purpose?

Mr. Fink: I think it would be helpful.

The Court: We will take a recess.

(Recess.)

Q. (By Mr. Fink): Mr. Koch, going back for a moment to this Monogram Pictures Corporation,

(Testimony of Maurice P. Koch.)

the matter that we were discussing a while ago with reference to the so-called Class B pictures you told us about, over what period of time were those negotiations carried on?

A. Those negotiations were carried on during the first part of 1947. It might have been the end of 1946. They were carried on for months. [89]

Q. What was your participation, what activity or what part did you play on behalf of H. Koch & Sons in connection with these matters? What did you do?

A. I was down in Los Angeles for conferences. I participated in the deals. There were a lot of changes made in how we were going into the deal and how we were going to make the pictures and what kind of budgets we were going to use and how much money a picture would cost, because we were going to make a series of pictures, and how much money the Monogram people were going to put up in the pre-production with us. I was active in the entire transaction at all times.

Q. During all of this time were you acting for H. Koch & Sons? A. Yes, sir.

Q. That is for your brothers and your sister?

A. That is right.

Q. Were your expenses being paid?

A. By H. Koch & Sons, yes, sir.

Q. By the partnership? A. Yes, sir.

Q. Was that true, by the way, throughout all these motion picture transactions?

A. That is right, sir.

(Testimony of Maurice P. Koch.)

June 9, 1948, which purports to be drawn on the Trust Account of Fink, Ralston, Levinthal & Kent to Annie Laurie Williams, Inc., for \$5,000.00.

A. Yes, sir.

Q. Do you recognize the signature of Cyrus Levinthal? A. Yes, sir.

Q. You have known Cyrus Levinthal for how long now?

A. I have known Mr. Levinthal for over 25 years.

Mr. Fink: We will offer these two checks as one exhibit, plaintiffs' next in order.

Mr. Gillard: To the check dated June 8, 1948, payable to Max Fink, for \$5,000.00 drawn by Maurice P. Koch, I will object to it on the ground there is no showing that that check has any connection with this case whatsoever. It is merely a check from Maurice Koch to Max Fink. The second check from Fink, Ralson, Levinthal & Kent, I will object to on the ground no foundation has been laid in any way, shape or form, to introduce that check in [95] evidence.

The Court: There is no testimony as to what the purpose of these checks was, as yet.

Q. (By Mr. Fink): Mr. Koch, the check of June 8, 1948, to Max Fink, for \$5,000, what was that for?

A. That was the second payment for the rights to the picture, "Hill of the Hawk."

Q. Did you give your attorneys any instructions as to what to do with that money?

(Testimony of Maurice P. Koch.)

A. Yes, sir.

Q. What were the instructions?

A. The instructions were to send the \$5,000 to Scott Odell or his agents.

Q. Who were his agents?

A. Annie Laurie Williams.

Mr. Fink: We offer the two checks, your Honor.

The Court: The checks are dated in 1948.

The Witness: Yes, sir.

The Court: They may be admitted and marked Exhibit 32.

(The two checks referred to were marked Plaintiffs' Exhibit No 32 in evidence.)

Q. (By Mr. Fink): Mr. Koch, on or about May 9th or May 10th, 1948, did you give some money to Fink, Ralston, Levinthal & Kent?

A. I might have.

Q. How much? [96]

A. Well——

Mr. Gillard: I object to that as no foundation having been laid. He doesn't even know if he gave any.

Q. (By Mr. Fink): Let me ask this question: What was the total cash amount paid for "Hill of the Hawk"? A. \$25,000.

Q. With the exception of the first \$7,000 that you told us which went to purchase stock of Ambassador Pictures—— A. Yes, sir.

(Testimony of Maurice P. Koch.)

Q. —has that \$7,000, after Ambassador Pictures got it, what was done with it?

A. It was sent to Annie Laurie Williams for the purchase of the rights of "Hill of the Hawk."

Q. That left \$18,000 unpaid, according to my arithmetic.

A. That is right.

Q. And that \$18,000, how was it paid?

A. The first payment was \$7,000. The next payment was \$5,000, and which I gave you a check for. The next payment was another \$5,000, which I gave you a check for. The last payment was \$8,000, which you also received a check for.

Q. I will show you here two checks of May 10th, one for \$4,500 and one for \$500, to be drawn on the Fink, Ralston, Levinthal & Kent trust account by Jerry Ralston. Do you recognize the signature of Jerry Ralston?

A. Yes, sir. [97]

Mr. Fink: We offer these two checks, your Honor, as plaintiffs' next in order.

Mr. Gillard: I object to them as being the activities of a third person not related to this case.

The Court: I take it one thing we should get clear to the jury is that the important thing we are interested in are the activities of this witness and of H. Koch and Sons for the year 1947. Is that correct?

Mr. Fink: Yes, your Honor.

The Court: These checks may be admitted as a part of a transaction which commenced in 1947, to show, if they do show, what the activities were in 1947.

(Testimony of Maurice P. Koch.)

Mr. Fink: Yes, your Honor. Our position, of course, is that the acts of their lawyers are just like their own acts.

The Court: Yes, but that is not the point. This is done in 1948.

Mr. Fink: As your Honor has pointed out, something started in 1947.

The Court: All right, it may be admitted for that purpose, Exhibit 33.

(The two checks referred to were marked Plaintiffs' Exhibit No. 33 in evidence.)

Q. (By Mr. Fink): I will show you check of July 9, 1948, made payable to Annie Laurie Williams, Inc., signed "Fink, Ralston, Levinthal & Kent, Trust Account, by Max Fink." Do [98] you recognize the signature of Max Fink?

A. Yes, sir.

Mr. Fink: Your Honor, these checks may be put together as one exhibit.

The Court: I think they should be part of Exhibit 33, which we just admitted in evidence.

Mr. Fink: Yes.

The Court: And it is admitted for the same purpose, to show, if it does show, any activities in the year 1947.

Gentlemen, we are going to take a recess at this time until two o'clock, and as I have told counsel in chambers, many of these things that are now being presented should have been taken care of in a pre-trial procedure so that the time of the jury and

(Testimony of Maurice P. Koch.)

Q. Returning now to "Hill of the Hawk," I believe you told us that you, that Ambassador Pictures acquired a book called "Hill of the Hawk," the motion picture rights to that book? [90]

A. That is right.

Q. Were there negotiations to your knowledge with regard to the acquisition of that property?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

The Court: I take it that is preliminary. It may be answered.

(To the witness.) Yes or no.

The Witness: Yes.

Q. (By Mr. Fink): What did you do in that connection?

A. I went down to Los Angeles. I discussed the property with you and gave you instructions to purchase the story of "Hill of the Hawk" for Ambassador Pictures Corporation, and for the production corporation. The negotiations of this, and the type of contract that we got, that we received from Scott O'Dell was very important. I sat in on these negotiations with you before the transactions were completed.

Q. Where did Mr. O'Dell live?

A. Mr. O'Dell lived back East.

Q. Did you ever meet Scott O'Dell?

A. I believe I met Scott O'Dell at Jack Chertok's house in your presence.

Q. Did you talk with him about the story of "Hill of the Hawk"? A. Yes, sir.

(Testimony of Maurice P. Koch.)

“Q. Did you spend any time discussing point of view with regard [91] to how a picture was to be made from that story? A. Yes, sir.

Q. To what extent?

A. We talked to the extent that we knew that it had to be a top cast. It had to have women in there, particularly one woman, with a lot of fire, possibly a little Latin in her. We needed characters such as Akim Tamiroff for a father, possibly a person like Gary Cooper for lead in the picture, Jennifer Jones—we figured on Jennifer Jones for the fiery woman, because she’s got a little Indian in her.

Q. I show you here a check of December 3, 1947. It purports to bear your signature.

A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Q. You noticed the date of December 3, 1947?

A. That is right.

Q. The check was made to Ambassador Pictures Corporation, is that right? A. That is right.

Mr. Fink: We will ask that this be marked plaintiff’s next in order, Your Honor.

The Court: Exhibit 30.

(The check referred to was thereupon received in evidence and marked Plaintiffs’ Exhibit 30.) [92]

Mr. Fink: May we indicate the check is for \$7,000.00?

Q. Do you recall where you were at the time you made out that check?

(Testimony of Maurice P. Koch.)

A. Yes, sir, I was at the Friar's Club in Hollywood.

Q. Who was present?

A. Milton Crasney, Dave Sebastian, Max Fink and myself.

Q. And Jack Chertok?

A. And Jack Chertok, yes, sir.

Q. What is Milton Crasney's business?

A. Milton Crasney is an agent and producer. He sells a lot of television shows on a percentage basis and he is doing quite a business at the present time.

Q. Do you know whether or not he is connected with a company called Gene Artists Corpoation?

A. That is right.

Q. Called G.A.C. in the industry?

A. That is right.

Mr. Fink: May we at this time offer as plaintiffs' next in order, Your Honor, the agreement between Scott O'Dell and Ambassador Pictures of December 12, 1947?

The Court: Is it an executed document?

Mr. Fink: Yes, Your Honor. The witness has identified at least the signature of the purchasing party.

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial, not bearing upon the issues of this case. The [93] activity of the Ambassador Pictures Corporation is not the activity of this witness.

(Testimony of Maurice P. Koch.)

The Court: It may be received solely for the purpose of showing that a contract was entered into as of the date that it bears. All of the detail that is in the contract, I take it, is not pertinent to this inquiry. It may be introduced for the purpose of showing that there was a contract that was entered into as of the date it bears.

(The agreement referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 31.)

Q. (By Mr. Fink): Now, what was the purpose of making out that \$7,000.00 check just referred to, Mr. Koch?

A. The purpose of making out that check was to buy the stock of Ambassador Pictures Corporation.

Q. Did you know what the \$7,000.00 was going to be used for? A. Yes, sir.

Q. What was that?

A. The purchase of "Hill of the Hawk."

Q. Was that the full purchase price or the down payment?

A. That was the first down payment, \$25,000.00.

Q. Mr. Koch, I show you here a check of June 8, 1948, to Max Fink for \$5,000.00 and ask you if that is your signature, Maurice Koch?

A. Yes, sir.

Q. Did you pay out that \$5,000.00 to Max [94] Fink? A. Yes, sir.

Q. I show you a check of the following day,

(Testimony of Maurice P. Koch.)

the Court should not be taken up. By the time you come back at two o'clock I expect you to show all documents to the other side that you are going to offer, so that they have an opportunity to examine them, and that we shall not waste the time of the Court and the jury sitting here while counsel is looking at documents.

How many more documents do you have?

Mr. Fink: They have all been before counsel. I have put them there so counsel can see them all, yesterday and today.

The Court: Why do we wait such a long time for the reading of them?

Mr. Gillard: If your Honor please, I got handed yesterday [99] morning during the course of the trial a stack of about 75 documents. You can recognize during that period of time I did not have a chance to look at them carefully because there was no opportunity while the case was going on.

Mr. Fink: I think the Government has always had copies of the important papers, the longer papers.

Mr. Gillard: I do not think we should encumber the record unnecessarily with this discussion. They gave me seven copies of documents.

The Court: Gentlemen, all of these things should have been done, as I stated before, in a pre-trial procedure, before you ever came into court. I am going to give you until two o'clock to examine all the documents, so that when we go ahead at two o'clock this afternoon we are not going to be faced

(Testimony of Maurice P. Koch.)

by delays by a document being presented then, and the Court and jury sitting here while it is being examined.

We will take a recess at this time until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 p.m.) [100]

Tuesday, November 27, 1956, 2:00 P.M.

The Court: Proceed.

Mr. Fink: By stipulation, your Honor, I should like to offer as one exhibit letter from H. Koch and Sons, signed "Murray," July 8, 1948; copy of reply to that letter signed July 9, 1948.

The Court: It may be introduced and marked Exhibit 34.

(The two letters referred to was marked Plaintiffs' Exhibit No. 34 in evidence.)

Mr. Fink: May I read these into the record and to the jury, your Honor?

The Court: All right.

Mr. Fink: Letter dated July 8, 1948, Exhibit 34, on the letterhead of H. Koch & Sons, Luggage Manufacturers, 73 Beale Street, San Francisco 5, California:

"Dear Max:

"Enclosed you will find the last payment which is \$8,000, for the book 'Hill of the Hawk.' It is not

(Testimony of Maurice P. Koch.)

necessary for me to tell you to be sure that this book is tied up completely, as \$25,000 isn't 'hay.'

"Will you please send me some sort of a letter advising me that the book is completely paid for and the property of Ambassador Pictures Corp., of which [101] I own all of the stock now, for after all I am responsible to the stockholders and I do not even have a piece of paper showing ownership of this book, as you know all of that is in your office where it should be kept. I should have some evidence of that fact in my files in San Francisco for my stockholders' benefit.

"Please let me hear from you on the above as soon as possible.

"With kindest regards, I am,

"Sincerely,

"MURRAY."

And it shows "Enclosure: Check."

The response to that is dated July 9, 1948, the next day, addressed to Mr. Murray Koch, care of H. Koch & Sons, 73 Beale Street, San Francisco 5, California:

"Dear Murray:

"This will acknowledge receipt from you of your check in the sum of \$8,000, which we this day deposited in our trust account. We have this day forwarded our trust account check to Annie Laurie Williams, Inc., agents for Scott O'Dell, author, in the sum of \$8,000, which constitutes our final pay-

(Testimony of Maurice P. Koch.)

ment in the acquisition of "Hill of the Hawk" by Ambassador Pictures, Inc.

"You have paid the sum of \$25,000, which constitutes [102] the entire cash price to be paid for the motion picture rights on 'Hill of the Hawk.' In addition to the sum of \$25,000, Mr. O'Dell is entitled to 5% of the 'net profits,' as the said term is defined in the purchase agreement.

"The ownership of the motion picture rights of 'Hill of the Hawk' is held by Ambassador Pictures, Inc., and all of the outstanding stock of the said corporation has been issued to you and now remains in your name. Under the circumstances, the corporation is entirely under your control.

"Kindest personal regards,

"Yours sincerely,

"MAX FINK."

Q. Mr. Koch, in your letter of July 8, 1948, addressed to Mr. Max Fink, you used the words as follows: "for after all I am responsible to the stockholders * * *" Whom did you have in mind when you wrote the word "stockholders" in this letter?

A. My partners.

Q. During the balance of the year, 1948—I won't go beyond that—did you continue to be the sole stockholder, or did all the stock of that corporation stand in your name?

A. Yes, sir.

Q. I believe you told us yesterday that you became involved [103] in some films made for the Signal Corps, and also for the Air Corps.

(Testimony of Maurice P. Koch.)

A. Yes, sir.

Q. When I say "you," I have reference to H. Koch & Sons. Do you understand that?

A. That is right.

Q. Approximately when did the project of making training films first start? I mean the discussions that led up to it?

A. The discussions that led up to the training films first started in 1947.

Q. About when, in that year?

A. I can't tell you exactly when, but it was the latter part of 1947.

Q. In any event, in the year 1947, what was done with regard to the project of these films?

A. The project was discussed, and preproduction money was needed before we could put in a bid for the contract.

Q. Was the financing generally for the making of these films required prior to contracting for them?

A. Yes, sir, because if the preproduction money was not there, and they were awarded the contract, they could not get started.

Q. Were you called upon to make any proofs of the availability of all the money necessary to produce such films?

A. Mr. Chertok took our word for it. We convinced them that [104] we were capable of providing the money, and that was satisfactory with Mr. Chertok.

Q. What did you do in the year 1947 prelim-

(Testimony of Maurice P. Koch.)

inary to the actual contracting for these films and the production of them?

A. Well, we had Mr. Miller up here, and Mr. Chertok. I introduced them to the president of our bank.

Q. Which bank is that?

A. Pacific National Bank.

Q. In San Francisco?

A. In San Francisco. Before they came up here I went down to see Mr. Lee Masters, who is the president of the Pacific National Bank, and told him that I had a terrific deal for him whereby the money would be fairly safe and it would be a good business deal for him, whereby we needed over a million dollars to finance 30 or 40 training pictures for the government, important pictures, and I told him that I was interested in the transaction; that we would supply all of the preproduction money for these training films, and that they would get their money back after completion, or the negative of the film. And I told Mr. Lee Masters that these films were going to be produced by Apex Film Corporation on Vine Street in Hollywood—Lysenko, rather, in Hollywood. I believe that is where his offices were at the time. And I gave them quite a history of Jack Chertok. I told him that [105] Jack was with M.G.M. for over 25 years; he had a lot of “Oscars”; he was a great producer; he had produced a lot of pictures. He had produced “Lone Ranger” pictures for television for General Mills, and was one of the most

(Testimony of Maurice P. Koch.)

competent men and most thought of men in Hollywood, and that I would recommend him very highly.

Q. Prior to the time that you had this discussion with the bankers how many times had you visited with Mr. Chertok with regard to the project of making training films?

A. I visited with him several times. We had a lot of discussions on these training films. We wanted to see the paper work on it. We wanted to know where the money was coming from, from the government; how secure the transaction would be; and the capabilities of Apex Film Corporation in making these films.

Q. How much time would you say you spent in Los Angeles in the year 1947 in preparation for this project?

A. We had many conferences together. I would say I spent a lot of time. I can't remember how much time, but I spent an awful lot of time with him.

Q. By the way, we mentioned this morning a company called Producers Finance Corporation, which I believe you told us was incorporated at your request by Mr. Grupp, an attorney here in San Francisco.

A. Right. [106]

Q. Did Mr. Grupp ever attend with you in Los Angeles during the year 1947 in connection with these training films?

A. Yes, sir, Mr. Grupp went down there.

Q. Were you with him? A. Yes, sir.

Q. What happened? What did you do there?

(Testimony of Maurice P. Koch.)

A. We discussed the financing of these various training films.

Q. Subsequent to all of these discussions, I show you here what purports to be copies of telegrams, one bearing date of January 14, 1948, and one January 15, 1948; a notice of award bearing date of January 14, 1948. I will ask you if you received copies of these documents? A. Yes, sir.

Q. Did you receive these copies, or these documents, in connection with your activities in the financing of this project?

A. Yes, sir. I had to know what was going on on this project all the time. I had to be kept informed because I was involved——

Q. The question is, were you informed?

A. Yes, sir.

Q. Did you keep yourself informed?

A. Yes, sir.

Q. Did you continue to be active on this [107] project?

A. Until the completion of the project, yes, sir.

Q. Did you, first of all, loan some moneys?

A. Yes, sir, we did loan some moneys to Apex Film Corporation.

Q. I show you a check of January 27, 1948. It seems to be drawn January 26, 1948.

Mr. Gillard: Pardon me, Counsel. Before you describe the check would you mind making an offer and allowing an objection to be made to it?

Mr. Fink: Do you object to the foundation, Counsel?

(Testimony of Maurice P. Koch.)

Mr. Gillard: Certainly.

Q. (By Mr. Fink): Mr. Koch, is this your signature? A. Yes, sir.

Mr. Fink: May I offer this check, your Honor, as plaintiffs' next in order?

Mr. Gillard: If the Court please, the evidence so far with reference to this Producers Finance Corporation and the manual training films that the witness has just testified to, the testimony indicates that there were preliminary discussions in 1947 which had not jelled into anything. It now appears that the first financial transaction that this witness was in was in 1948, which is subsequent to the year in issue in this suit, and on that ground I will object to any evidence of the financial arrangements with reference to Producers Finance Corporation or Apex Films in 1948. [108]

Mr. Fink: Our position, your Honor, if I may state it, is that this project was conceived and the financing was committed in the year 1947, or there could not have been any proposals or bids made to the company which gave rise to the final contracts which occurred in January of the following year, and that naturally, until you get a contract from the government, there was no need in spending any money. It is true that this check bears date of January 26, 1948.

The Court: I think the witness can testify to his activities in connection with this matter in 1947, and may generally say that payments were made in 1948, if that were the fact. But as to the details of

(Testimony of Maurice P. Koch.)

the individual checks, I do not believe they would be admissible if they were delivered in 1948, and the only reason for showing activity in 1948 is to show, if it does show, what the activities were in 1947.

Q. (By Mr. Fink): Mr. Koch, pursuant to these discussions and negotiations you told us about in 1947, did you thereafter make available funds, your funds, funds of H. Koch & Sons, and funds of Producers Finance Corporation, for this project?

A. Yes, sir.

Q. Did you arrange the million-dollar loan you were talking about a moment ago?

A. Yes, sir.

Q. Were these funds forthcoming for this [109] project.

A. Yes, sir.

Q. Were those training films produced?

A. Yes, sir.

Q. Approximately how many of them were there?

A. There were approximately 30 or 40. I can't remember.

Q. Was the nature of these films secret?

A. Pardon me?

Q. Were they classified as secret information?

A. These are fairly classified. I wouldn't discuss them.

Q. In any event, they were actually filmed and delivered, is that correct?

A. They were delivered and paid for.

The Court: In 1948, or thereafter?

(Testimony of Maurice P. Koch.)

A. Thereafter, yes, sir—in 1948 or thereafter.

Q. (By Mr. Fink): You have in mind after January 1, 1948, or after the close of 1947, which is our year in question. They were after that?

A. Yes.

Q. By the way, in your experience in connection with the film business and the financing of film activities, what, in general, are the time problems that are involved?

Mr. Gillard: I object to the question as ambiguous, if the Court please.

The Court: I think it is.

You can reframe it, Counsel. [110]

Mr. Fink: I guess I am a little bit confused by it, myself, your Honor. I am sorry.

Q. In your experience in the financing of films and the setting up of the transaction necessary to produce films, what time delays have you generally experienced?

The Court: From what to what?

Mr. Fink: Well, in the negotiations, preparation leading up to the actual date of the turning of cameras.

Mr. Gillard: If the Court please, I will object to it as incompetent, irrelevant and immaterial. He can ask for the particular sequences involved in the activities Mr. Koch was engaged in, but as to his general experience, that is a little remote.

The Court: That is right. There may be a lot of irrelevance involved in it.

Mr. Fink: That is true. I will withdraw the question.

(Testimony of Maurice P. Koch.)

Q. Mr. Koch, I think you told us yesterday that prior to the actual filming of the picture, "Copacabana," you spent some three weeks at Goldwyn Studios in Los Angeles, or Hollywood.

A. Yes, sir.

Q. I wonder if you could tell us, just what did you do during that three-weeks period—not what was said or done by other people; just what did you do during that three weeks period? [111]

A. I went over the budget of the pictures—of the picture.

Q. What do you mean by "budget"?

A. Well, the budget that allocated so many dollars for costumes, so many dollars for sets, so many dollars for so many dance numbers, floor numbers, on the show. In other words, the budget of the picture, the dollars and cents spent in making the entire picture, which included not only labor, but materials.

Q. In reviewing this budget during that three weeks that you were in Los Angeles did you do anything in connection with the budget?

A. Yes, sir.

Q. What did you do?

A. Well, I visited all of the sets. I went over the sets with the departmental heads. We discussed the costs of these various sets. We cut expenses here; we added more onto other departments.

Q. What do you mean by you "cut expenses here"? Will you give us an example of that?

A. Well, yes. The budget was a little high, and

(Testimony of Maurice P. Koch.)

when we determined to make this picture we allowed so much for the burdget for preproduction, and we knew what we were going to get from the bank and Standard Capital, and we had to keep more or less in line with that budget, for if we went overboard we might be in trouble with the bank or with Standard [112] Capital, and if the picture cost us more money than we figured it would cost us, we would not make what we figured we would make on the picture.

Q. Did you change the amounts of money allotted for any particular sequence in the picture?

A. Yes, sir.

Q. Can you give us an example of that?

A. Yes. We had—well, I will put it to you this way: We had very good people down there, and they are artists. They have a tendency, on sets, to go overboard. Cost sometimes doesn't mean too much to them, but to the producer it means a lot. We got the people in that department together—Sam Coslow, we got Dave Hersh—and we went out on the sets, and we cut the costs of manufacturing these particular sets. We made some of them a little less elaborate; we made some of them a little more elaborate. But we went over these figures to try to keep the costs on these sets within the budget, and the same thing applied to costumes for the girls. They had a lot of dance routines there—they must have had 30, 35, 40, or more there. We cut those down considerably.

(Testimony of Maurice P. Koch.)

Q. What was the occasion for cutting them down?

A. Well, it cost too much money. As I said before, we were trying desperately to stay within the budget as much as we could.

Q. You told us you talked to the individual department heads. [113] Did you make inquiry with regard to the cost of the various elements that were to make up the picture? A. I did, sir.

Q. Did you have occasion to talk to the writers?

A. Yes, we had meetings with the writers. We rewrote that story several times. We had about 11 writers altogether on this picture, "Copacabana," and we had a lot of meetings on this, and we really had to cut it down, because the costs there were getting a bit exorbitant. We had meetings, decided what we were going to do, and we limited the story to a limited amount of writers, letting some of the writers go, and finally made a decision of how it was going to be and what final costs we would eventually wind up with.

Q. Did you read the materials that were prepared from day to day? A. Yes, sir.

Q. Prior to this three weeks stay in the studio had you been to the studio on previous occasions during the preparation of this picture for filming?

A. Yes, I had.

Q. On how many occasions?

A. On many, many occasions.

Q. During the course of the photography, dub-

(Testimony of Maurice P. Koch.)

bing, and the cutting of that film, did you also return to Goldwyn Studios from time to time? [114]

A. I did. I saw the films shown the next day of what was taken the previous day.

Q. Did other members of your family, or your partnership, also go down to Hollywood in the course of the filming of this picture and attend at the studio? A. That is right, they did.

Mr. Fink: I believe that is all at this time of this witness.

The Witness: Do you want these, Mr. Fink?

Mr. Fink: Excuse me. These are dated in 1948, your Honor, so I will not offer them at this time.

Cross-Examination

By Mr. Gillard:

Q. Mr. Koch, as I recall your testimony, your first testimony in this case, the start of your activities was sometime before this "Copacabana" venture, with reference to several matters which, as I believe you expressed it, did not jell, is that correct? A. That's right.

Q. And I understand that along in that period of time it came to your attention from your attorney, Mr. Grupp, that the existing partnership agreement in the Koch family was insufficient to cover any motion picture financing activities on your part, and that pursuant to his suggestion an amendment was made to the partnership agreement? A. That is right. [115]

Q. And that amendment, which is Exhibit 2 in

(Testimony of Maurice P. Koch.)

evidence in this case, was dated the 23rd day of October, 1944? A. That is right.

Q. And the reason for that amendment, Mr. Koch, was that the original partnership agreement required that you spend all of your time in the luggage manufacturing business, and if you did not so spend all of your time in that business your partnership interest was subject to forfeiture?

A. No, sir, I do not believe that is true.

Q. I just asked you the question.

Mr. Fink: Just a moment, please.

I am a little late, your Honor, but may I move to strike the answer for the purpose of the objection?

The original agreement, as well as the amendment to the partnership, speak for themselves, your Honor. I do not think the witness should be called upon to state what they mean or say.

The Court: I think they do speak for themselves. However, counsel may interrogate about them if there is any doubt about what they say.

Q. (By Mr. Gillard): Wasn't the reason for the amendment to the partnership articles, Mr. Koch, the advice of Mr. Grupp that under the existing partnership articles your interest would be subject to forfeiture because you were not entitled to spend any time except in the luggage manufacturing business? [116] A. That is not true.

Q. What was the reason for that amendment, Mr. Koch?

A. One of the main objections—I mean, one of the main reasons to draw up a new agreement was

(Testimony of Maurice P. Koch.)

there is a clause in that partnership agreement that says that if any of the partners are absent from the business—I don't remember whether it is 30 or 60 days; I believe it is 60 days—that for \$1,000 we could pay that partner off, and he shall never receive any other remuneration from the business. And it looked to me like we were going into other ventures. The luggage business was—we had been in it before, and we felt after the war the luggage business would sort of slide, which it finally did, and we thought we wanted to get into some other business where we could make some money, and it might take more of my time than what the contract called for, and that is one of the most pertinent reasons Mr. Grupp suggested that we draw up another contract, so there would be no difficulties in the future.

The Court: Mr. Gillard, when you ask that a document be identified, of you will, for the record, say what it is, so the record shows what is—just briefly.

Mr. Gillard: Will you mark for identification, if the Court please, document dated October 10, 1951, notarized by Maurice P. Koch October 15, 1951?

The Court: That is all right. [117]

Mark it Government's Exhibit A for identification.

(The 24-page tax protest referred to was marked Defendant's Exhibit A for identification.)

(Testimony of Maurice P. Koch.)

Q. (By Mr. Gillard): Preliminarily, Mr. Koch, I will hand you Plaintiffs' Exhibit 1, which is the original partnership agreement, and calling your attention to the last paragraph on page 3 thereof, will you read that, sir? A. "It is further"—

The Court: Just read it to yourself.

A. Pardon me (perusing document.)

Yes, sir. I read that.

Q. (By Mr. Gillard): The original partnership agreement provides, does it not, Mr. Koch:

"It is further understood and agreed that all of said parties hereto shall devote all of their time to the interests of the said business and for the benefit thereof." A. That is right.

Q. Wasn't it in connection with that provision that Mr. Grupp advised you that your activities in connection with the motion picture financing were in violation of that agreement?

A. That, and the previous statement that I made. I am not familiar with the entire contract at the present time, but the thing that I told you about, the 60 days, is very prevalent in my mind. [118]

Q. I will show you Defendant's Exhibit A for identification and ask you if that is a document which you executed in October, 1951?

Mr. Fink: I will stipulate the witness signed it. It may go right into evidence.

Mr. Gillard: I do not desire to offer the whole document at this time, if the Court please. I want to direct the witness' attention to certain portions of it as we go along.

(Testimony of Maurice P. Koch.)

Mr. Fink: May I be heard?

The Court: There is nothing before the Court. You stipulated he signed it. That is all, so far, we have reached.

Mr. Fink: If I may, your Honor?

The Court: Let us go on to the next question, please.

Q. (By Mr. Gillard): Subsequent to the date of the execution of the amendment to the partnership articles, in October of 1944, were your activities in connection with the motion picture field pursuant to the amended articles of partnership, those amended articles of partnership?

A. I didn't get the beginning of that. I can't hear you very well, either.

Q. Were all of your activities in connection with your motion picture activities subsequent to October, 1944, pursuant to the terms of the partnership agreement as amended on that date?

A. Did you say prior to that— [119]

Q. Subsequent—after that time, sir. Were your activities in the motion picture field conducted pursuant to the authority contained in the amended partnership articles of October, 1944?

A. Yes, they were in line with the new agreement.

Q. You got your authority to act in connection with the motion picture business from those articles, did you not, sir? A. Yes.

Q. And all of your activities were pursuant to

(Testimony of Maurice P. Koch.)

the authority contained in that amendment of October, 1944? A. I would say so, yes.

Q. And, Mr. Koch, will you tell us, during the year 1946, what were your activities in connection with the luggage business of the Koch partnership?

A. During the year 1946?

Q. And 1947.

A. I was the general manager of the firm. I did most of the procurement. I did most of the selling. Ran the firm as general manager.

Q. I gather from your answers to Mr. Fink's questions your two brothers were in the manufacturing end of the plant?

A. That is right, sir.

Q. And your sister was the bookkeeper?

A. That is correct.

Q. Outside of that were the business affairs of the [120] partnership, as far as the luggage manufacturing was concerned, in your hands?

A. That is right.

Q. In addition to all the financing and all procurement you also did all the selling?

A. That is right—not all the selling; part of it. We had some commission men out selling to the post exchanges and ship's stores.

Q. Were there any salesmen employed by H. Koch & Sons outside of yourself?

A. No, sir.

Q. Were those commission men you referred to employed during 1946? A. Yes, sir.

Q. Are you certain, Mr. Koch?

(Testimony of Maurice P. Koch.)

A. Yes, sir.

Q. They were employed in 1947?

A. Yes, sir.

Mr. Gillard: By stipulation I will offer in evidence the 1946 partnership return of H. Koch & Sons, a photostatic copy thereof.

The Court: Exhibit B.

(The partnership income tax return for 1946 referred to was marked Defendant's Exhibit B in evidence.)

Mr. Gillard: I offer also the 1947 partnership return [121] of H. Koch & Sons.

The Court: Exhibit C.

(The partnership income tax return for 1947 referred to was marked Defendant's Exhibit C in evidence.)

Mr. Gillard: I offer the individual tax return of Maurice P. Koch for 1946.

The Court: Exhibit D.

(The individual income tax return for 1946 referred to was marked Defendant's Exhibit D in evidence.)

Mr. Gillard: I offer the individual income tax return of Maurice P. Koch for 1947.

The Court: Exhibit E.

(The individual income tax return for 1947 referred to was marked Defendant's Exhibit E in evidence.)

(Testimony of Maurice P. Koch.)

Q. (By Mr. Gillard): Mr. Koch, what area did your selling activity involve?

A. The 12 Western States.

Q. The commission sales that you referred to, do your books and records reflect what portions of the gross sales of the partnership were the result of the activities of those commission men?

A. Yes, those records will speak for themselves. They are in the books.

Q. You do not know at the present time what they are, is that so? [122]

A. No, sir.

Q. I will show you Exhibits B and C, which are the partnership returns for 1946 and 1947, and calling your attention to the fact that in the list of expenses for 1946 no expense is shown for commissions paid, whereas there is an item of \$28,000 listed as commissions paid for 1947. Does that refresh your recollection as to whether or not commission men were employed in 1946?

A. That is right; they must have started in 1947, then. I am sorry. I was speaking from memory.

Q. What was the gross revenue of the partnership for 1946, Mr. Koch?

A. The gross revenue—well—the cost of goods sold——

Mr. Fink: May I interrupt, Mr. Koch?

I object to that upon the ground it is immaterial what the gross revenue is, your Honor.

The Court: The tax returns are in evidence. I take it any part of them——

(Testimony of Maurice P. Koch.)

Mr. Fink: Then they would speak for themselves, your Honor.

The Court: Yes, they do, but I take it he can ask that. It may be preliminary. I don't know.

Q. (By Mr. Gillard): The gross sales for the partnership for 1946, Mr. Koch, were how much?

A. 1946 were \$540,375.82. [123]

Q. And I gather from your testimony you were responsible for all those sales? A. Yes, sir.

Q. What was the gross revenue, gross sales for 1947?

A. 1947 it says "Revenues—Net," here. Is that sales?

Q. Gross sales would be the top figure, I suppose. A. \$555,532.46.

Q. Do you know what part of that was the result of your activities as a salesman for H. Koch & Sons?

A. I couldn't tell you offhand. I would have to subtract the amount of sales that were paid commission men from that total, and the balance would be mine.

Q. During 1946 and 1947, Mr. Koch, were you interested in any other business activity besides luggage sales and motion picture financing?

A. Yes, sir.

Q. What business was that?

A. Oh, besides motion picture financing?

Q. Yes, sir.

A. I was interested in a fiber-glass plant.

Q. What was that?

(Testimony of Maurice P. Koch.)

A. I was interested in a fiber-glass plant.

Q. As a part owner?

A. No, sir, not at that particular time, but I finally wound up buying it. [124]

Q. What year was that?

A. That was the year of—it could have been the end of 1946 or the first part of 1947. I can't remember.

Q. Where was that fiber-glass plant located, sir?

A. In San Rafael. I invested a lot of money. I helped finance the company. And I finally wound up buying the plant.

Q. This was in connection with the shift in the luggage manufacturing business to a fiber-glass product?

A. That is right, sir.

Q. When did you first start to become interested in that fiber-glass plant?

A. I believe it was around 1946.

Q. With whom were you dealing for the purchase of that property?

A. With whom?

Q. Yes, sir.

A. Well, I finally bought it from a Bankruptcy Court.

Q. In connection with that you had to examine the plant that was there?

A. Yes, sir.

Q. Go over the books and records of the company?

A. No.

Q. You did not do that?

A. No, sir. I owned most of the molds in the company, and the things that they left were practically of no consequence. [125] I just wanted to

(Testimony of Maurice P. Koch.)

make sure no one else got it, because we had spent a lot of money there developing.

Q. How much time did you spend in 1946 investigating and making up your mind about the purchase of that fiber-glass plant?

A. My brothers did most of the investigating. It was mostly engineering, developing, and things like that.

Q. You made the purchase toward the end of 1946?

A. I believe the purchase was made in 1947. I have records on that.

Q. Were you interested in any other business in 1946 and 1947? A. Motion pictures.

Q. Is that all, sir?

A. I can't think of anything right now.

Q. Weren't you actively engaged in the partnership with Farilla & Sons, Mr. Koch?

A. Oh, yes; yes, sir. I was a partner in Farilla & Sons from 1946 to 1947. I forgot all about that.

Q. You were active in the running of that business, were you not?

A. Yes, sir; I was active at the beginning of the business for about six months—helped them out; maybe six months to a year.

Q. What did you do in connection with A. Farilla & Sons, or [126] Farilla & Sons?

A. I helped them in the buying, and gave them a lot of knowledge of merchandising, and I helped them in financing purchases, credits, and things

(Testimony of Maurice P. Koch.)

like that. We did help them in the financing of the business.

Q. As a matter of fact, it was by virtue of your experience and your credit with Koch & Sons that you were primarily of value to the Farilla partnership?

A. Let me explain that. Mr. Farilla was a very good friend of mine. I didn't go into that venture with the intentions of making any money. Mr. Farilla, when he was discharged from the Army, he came down to San Francisco and spent over three months in my house with his wife and child. He had some office up in Portland and Seattle. I knew Frank for about 30 years, and I wanted him to settle down in San Francisco. So I tried to set him up in business. I actually set Farilla up in business in San Francisco. As a matter of fact, when he went into business all that both of us put in was about \$2,000 each. It wasn't very long before we got that out of the business.

Q. That \$2,000 was hardly sufficient to run a business of the size that the Farilla partnership developed into, was it, Mr. Koch?

A. At that particular time, in 1946, money was turning over fast, and, by golly, we got paid for merchandise in 1946 before [127] we delivered it, practically speaking, and we rolled that money around.

Q. What did you do for the Farilla partnership, sir?

A. Well, I gave Farilla a lot of advice. I helped

(Testimony of Maurice P. Koch.)

him in the merchandising business and I helped him in the buying.

Q. This was continuous throughout the year 1946?

A. Well, practically through the year 1946, yes.

Q. Your return for those activities was substantial, was it not, Mr. Koch?

A. My return—you will find my tax on my return for the profits that we received, yes, sir.

Q. For the year——

A. 1946 and 1947. I got out in 1947.

Q. In 1946 you received as your share of the Farilla partnership \$10,432?

A. Whatever is there.

Q. In 1947 you received \$9,511?

A. The record speaks for itself, yes.

Q. Now, you first heard about the “Copacabana” deal from whom?

A. I first heard about the “Copacabana” deal from Dave Sebastian.

Q. Do you remember when that was, Mr. Koch?

A. That was in the early part of 1946.

Q. Do you know the date, sir?

A. No, sir. [128]

Q. Was it before or after the Beacon Pictures Corporation was formed?

A. I believe it was—I can’t tell you exactly, but I believe it was before it was formed. I am not sure.

Q. Did you have anything to do with the formation of Beacon Pictures Corporation?

(Testimony of Maurice P. Koch.)

A. Personally, no.

Q. That was formed by whom, sir?

A. Beacon Pictures Corporation was formed by Hersh, Coslow—I will tell you who the stockholders were, there—was that your question?

Q. First, who formed it?

A. I think Hersh and Coslow formed it, or Hersh, Coslow, Batchelor, Monte Proser and George Frank. I couldn't tell you who formed it.

Q. Did any of those gentlemen discuss with you the advisability of forming the Beacon Pictures Corporation?

A. I talked to Hersh and I talked to Coslow, and as part of our deal we advanced them money to participate in the stock of Beacon Pictures Corporation. I don't know whether they put the money in there to form the corporation, or whether they put the money in there to buy the stock. I imagine they bought stock. In this picture business it doesn't make any difference. The corporation might have been dormant for a long time, but if it didn't have any money, it didn't have any [129] vehicle to move with, and the money was the thing that counted. So it was formed or it was not formed. I can't remember, now, after ten years.

Q. Do I understand your testimony correctly, Mr. Koch, that you had no part in the advice, or other discussions—any advice or discussions leading up to the formation of Beacon Pictures Corporation?

(Testimony of Maurice P. Koch.)

A. I didn't have anything to do with the Beacon Pictures Corporation.

Q. I believe you testified on direct examination that that first check that was sent by you on behalf of the partnership for \$15,000, out of that check \$10,000 was for the purpose of incorporating Beacon Pictures Corporation.

A. I just told you a few moments ago that that \$10,000 that we gave Hersh, that we sent down to Mr. Sebastian, was for the stock in the corporation, for Hersh and Coslow, and I don't know whether they formed the corporation, bought stock, or if that was part of the deal, but that \$10,000 was for stock for Hersh and Coslow, for which they were to pay back the \$10,000 plus an interest in the picture.

Mr. Fink: We have a stipulation between counsel that the deposition, which was rather hurriedly prepared—only two days given to the reporter last week for that purpose—may be used without signature with the same effect as though signed and acknowledged. [130]

Q. (By Mr. Gillard): Do you recall you were in my office about a week ago today, Mr. Koch, and I took your deposition in this matter?

A. That is right.

Q. Do you remember, sir, at that time I asked you with reference to this \$17,500?

A. Yes, sir.

Q. Do you recall at that time that you told me, on page 31 of the deposition:

(Testimony of Maurice P. Koch.)

“A. All right, then, that was split into two checks. \$10,000 of that was given to Hersh and Sam Coslow to form the corporation, and \$7,500 of that was given to Hersh and Sebastian for immediate expenses down there to get the thing going, get the picture going.”

Do you recall that? A. I did——

Mr. Fink: May I request, your Honor, that the usual foundation be laid; that the witness be shown the deposition and given a chance to read it?

The Court: All right.

The Witness: I remember that. That is right.

The Court: Just a moment. There is no question pending now.

Q. (By Mr. Gillard): Was that your testimony at that time, [131] sir?

A. Yes, sir. I would like to explain that. This transaction occurred about ten years ago. When I went in to take this deposition I was giving you all the answers that I could honestly, from memory. Since then I have refreshed my memory and found out it was not given to them to form the corporation, but it was given to them to purchase some stock in the corporation, and that is of record. I was answering all of these questions—but it did go into the corporation, the money did go into the corporation, and the corporation was there.

Mr. Gillard: I will offer in evidence a certified copy of the Articles of Incorporation of Beacon Pictures Corporation filed in the office of the Sec-

(Testimony of Maurice P. Koch.)

retary of State on April 8, 1946, as defendant's next in order.

The Court: Exhibit F.

(The Articles of Incorporation referred to were marked Defendant's Exhibit F in evidence.)

The Court: Is it convenient to take a recess at this time, Counsel?

Mr. Gillard: Yes, your Honor.

The Court: We will take a short recess.

(Recess.)

The Court: Proceed.

Q. (By Mr. Gillard): Mr. Koch, these first checks that were [132] issued in this situation, the one for \$15,000 and the one for \$2,500, were the funds of H. Koch & Sons, the partnership, is that correct? A. That is correct.

Q. And you have testified, now, that \$10,000 of that went to the partnership of Hersh and Sebastian, and then they used that to buy an interest in Beacon Pictures Corporation?

A. No, sir; I testified that that \$17,500 was split up into two parcels. The \$10,000 went to Hersh and Sam Coslow for procuring their stock in Beacon Pictures Corporation, and the \$7,500 went to Hersh and Sebastian for expenses in getting the show on the road.

Q. The loans were made by H. Koch & Sons to whom?

(Testimony of Maurice P. Koch.)

A. The checks speak for themselves. I believe the check was made out to David Sebastian. I am not sure. I would have to look at them.

Q. That is correct, sir. At that time was Sebastian in the partnership?

A. Sebastian had a partnership with Hersh.

Q. These moneys were advanced to David Sebastian and not to Sebastian and Hersh, is that correct?

A. The moneys were advanced to David Sebastian; he turned them over to the partnership, and I believe the partnership gave them to Hersh and Coslow. That is the \$10,000.

Q. As far as you were concerned, the transaction was with [133] David Sebastian and H. Koch & Sons, and was not concerned, therefore, with what David Sebastian did with that money, is that correct?

A. No, sir. Sebastian and Hersh were actually working for me in this deal, and they were looking out after that money, and I was to receive interest in the picture. I was participating in the picture for the money that I put into the Hersh and Sebastian, or the Hersh-Coslow, or Beacon Pictures—as a matter of fact, I think I wound up to be the biggest participator in the entire picture. I had more interest in the picture than any individual.

Q. Your sole interest or remuneration for that money was to come to you from Sebastian or Sebastian and Hersh, was it not?

(Testimony of Maurice P. Koch.)

A. No; we had notes from Beacon Pictures Corporation, too.

Q. I am not referring to the \$80,000 represented by notes to the Beacon Pictures Corporation, Mr. Koch. I am referring to this \$17,500 which was represented by these two checks to David Sebastian.

A. Yes. When the corporation would have been liquidated at the end of the picture we were to receive—we were to have the \$10,000 that we gave Hersh and Coslow back, plus an interest—plus part of their interest in the picture, and the same thing applied to the \$7,500 from Hersh and Sebastian.

Q. Are you testifying that you considered the \$17,500 loaned [134] to David Sebastian was a direct loan by you to Beacon Pictures Corporation?

A. Well, you speak of a corporation, or a picture corporation. A picture corporation is nothing more—and this is common in the picture business, and I have been related to the picture business for 25——

The Court: Will you answer the question?

Read the question.

Then answer it, and then you may explain.

(Question read by the reporter.)

A. Well, it wasn't loaned to Beacon Pictures Corporation. But can I explain this?

Q. (By Mr. Gillard): The loan was to David Sebastian, is that correct?

A. It was to Hersh and Sebastian.

(Testimony of Maurice P. Koch.)

The Court: You may explain it.

A. The corporations in a picture business is merely a vehicle to move one picture, and when the picture is through the corporation is liquidated.

Now, we deal mostly with individuals, and as far as we were concerned, **H. Koch & Sons, it didn't** make much difference whether we gave money to Hersch and Sebastian, or Hersch and Coslow, or Beacon Pictures Corporation. It was practically all one part of one money for one purpose in mind, and that was to make a picture called "Copacabana," and we were dealing [135] with individuals and not a corporation, but the corporation was merely the legal vehicle by which the picture moved, and borrowed money from the Bank of America and Standard Capital and various other things to complete the picture and release it through various releases as well as United Artists.

I hope I made myself clear.

Q. (By Mr. Gillard): Mr. Koch, subsequently, after the \$17,500 transaction, there was advanced by the partnership directly to Beacon Pictures Corporation \$50,000, and then \$30,000 represented by the checks and the notes which are in evidence, is that correct? A. That is correct.

Q. And those were direct loans by the partnership to Beacon Pictures Corporation?

A. That is correct.

Q. And that was the sum of money, that \$80,000, for which you subsequently sued the Beacon Pictures Corporation, is that correct?

(Testimony of Maurice P. Koch.)

A. Not that \$80,000, no, sir. We sued Beacon Pictures Corporation for \$75,000 in our name and \$5,000 in R. J. Haller's name.

Q. That is a total of \$80,000?

A. That is right, sir, but it wasn't that particular \$80,000. I mean, if you want to put all the moneys together, I can't pinpoint it on that \$80,000, because there was \$97,500 in the [136] whole deal, and we only sued for \$80,000.

Q. What evidence of indebtedness did you have upon which you sued Beacon Pictures Corporation, outside of the two notes in evidence, one for \$50,000 and one for \$80,000? A. \$30,000.

Mr. Fink: To which we object on the ground there is no foundation laid that Beacon Pictures was ever sued, based upon any evidence of indebtedness.

The Court: He may answer if there were not.

The Witness: I don't remember suing them. They went into bankruptcy, I believe. We never sued them.

The Court: A moment ago you said you sued them.

A. No; I meant—he asked me, and confused me—pardon me, sir—Mr. Gillard asked me and confused me. We put in a claim in bankruptcy, is what we did, and the record speaks for itself. It is there.

Q. (By Mr. Gillard): You did not sue Beacon Pictures Corporation? A. No, sir.

Mr. Gillard: May this document, which is a judg-

(Testimony of Maurice P. Koch.)

ment dated in June of 1949, be marked for identification?

The Court: Exhibit G for identification.

(The default judgment referred to was marked Defendant's Exhibit G for identification.)

Q. (By Mr. Gillard): I will show you Exhibit G for [137] identification, Mr. Koch, and ask you if this refreshes your recollection as to whether you sued Beacon Pictures Corporation.

A. Well, I have forgotten this completely, because I never was there at the trial.

Q. Does that refresh your recollection, sir?

A. I just can't remember suing them, but I guess it must have been. It says here that we sued, and since Beacons never showed up, they gave us judgment.

Q. That is correct, sir?

A. I didn't remember that.

Q. I will show you a transcript of your deposition taken last week, on page 38 thereof, and ask you to read your answer at the bottom of that page.

A. (After perusing deposition.) This confused me.

Q. Let me ask you a question, Mr. Koch.

A. Yes, sir.

Q. At that time did I ask you the question as to whether or not the basis of the suit—

The Court: Read the question.

Q. (By Mr. Gillard, reading): "Q. Mr. Koch,

(Testimony of Maurice P. Koch.)

this suit was—the basis of this suit was two promissory notes signed by Beacon Pictures Corporation, each in your favor, one for \$50,000 and one for \$30,000, wasn't it? [138]

“A. That is correct.”

Mr. Fink: Will you read on, Counsel.

Q. (By Mr. Gillard): Is that the question and the answer?

A. Yes, sir. May I explain that, please? In my mind I know that we filed for the money that was coming to us, in bankruptcy, and I didn't know whether that was a suit or whether it was filed in bankruptcy as money that was coming back to us, and I guess I am confused relative to the suit and the bankruptcy, but we did put in a claim for it either way.

Q. You are referring now to the second document in Exhibit G, which is the claim signed by you on July 20, 1949, in the matter of Beacon Pictures Corporation.

A. That is my signature. That is what I thought we had. Is that the bankruptcy?

Q. Yes, sir.

A. That is the one I thought.

Q. Looking at those two documents together, Mr. Koch, is your recollection refreshed that you sued Beacon Pictures Corporation for \$80,000; that the claim included some \$15,000-odd of interest, making a total claim of \$95,319; that you filed that claim in bankruptcy and supported it with a copy of the judgment secured which you have in front of you?

(Testimony of Maurice P. Koch.)

A. Evidently that is what was done here.

Mr. Gillard: I will offer those two documents in [139] evidence, if the Court please.

The Court: They may be admitted and take the same letter.

(The two documents formerly marked Defendant's Exhibit G for identification were now received in evidence and so marked.)

Q. (By Mr. Gillard): Mr. Koch, you testified extensively as to some activities on your part in the latter part of 1946, when you said they were having difficulty with this "Copacabana" film. At that time your sole interest in this matter was as an investor in Beacon Pictures Corporation as represented by the monetary transactions we have already discussed, is that correct?

A. Well, I was more than an investor. I actually participated in "Copacabana."

Q. You mean in the making of the picture?

A. Yes, sir.

Q. I gathered from your testimony on direct examination that you were sort of an advisor to the producer, to the cameraman, to the property men, and to the scenery makers, and to the financial men, and everybody concerned with that picture, is that right?

A. I didn't say I was an advisor.

Mr. Fink: Just a moment, please.

I object to the question, your Honor, on the ground it is [140] argumentative.

The Court: Sustained.

(Testimony of Maurice P. Koch.)

Mr. Fink: Thank you.

Q. (By Mr. Gillard): At the time that you went down there, you testified on direct examination that you told Mr. Fink to file a suit against the Bank of America for a million dollars.

A. That is right, sir.

Q. Did you have any contracts or contractual obligations with the Bank of America?

A. Personally, no.

Q. When you were talking about the fact that you asked Mr. Fink to sue the Bank of America, you were talking about on behalf of Beacon Pictures Corporation?

A. That is right.

Q. And your sole interest at the time in seeing that the Bank of America and Standard Capital came through with their loans was for the purpose of protecting the pre-production money which you had already advanced, is that correct?

A. Well, that and a lot of other things.

Q. What other things?

A. Well, my main purpose of going down—my main purpose of making sure that we got the bank money was not only to protect the money that we had put in Beacon Pictures Corporation but to see that the picture was made so that we could make a dollar off of it. After all, I had spent a lot of time in [141] promoting this thing and we not only wanted to get our money out of it but we wanted to get a profit.

Q. Prior to the end of 1946, at the time “Copaca-

(Testimony of Maurice P. Koch.)

bana" was started to be filmed, what had been your experience in making motion pictures, Mr. Koch?

A. Well, I have seen a lot of pictures, I have been on a lot of sets in the last 25 years. My father-in-law was a pretty large person in motion pictures.

Q. I asked you what your experience was.

A. I had been down in Hollywood with my father-in-law when he was alive. We had discussed a lot of pictures backwards through 1944. We had gone into a lot of deals, and as far as the business ability of making motion pictures and promoting motion pictures, there is not a lot of difference in that business and merchandising as there is in other businesses. You can hire artists, you can hire writers, you can hire directors, you can hire producers, and if you have got a pretty good knowledge of what is going on, you can make a picture.

Q. Now, sir, to go back to my question, what is your personal experience in making motion pictures prior to this time?

A. In making motion pictures?

Q. Yes.

A. Well, I never actually made one myself I don't know anyone that has. [142]

Q. Were you ever an employee of a company that did make a motion picture prior to this time?

A. No, sir.

Q. Were you ever on anybody's payroll in connection with the making of a motion picture prior to that time?

A. No, sir.

Q. The next corporation you testified to was the

(Testimony of Maurice P. Koch.)

Ambassador—is that Ambassador Pictures Corporation?
A. That is right.

Q. Or Ambassador Production, Inc.?

A. We called it both. They are Ambassador Productions Corporation.

Q. The idea for the formation of that corporation came from Mr. Fink, did it?

A. Well, not exactly. I talked to Mr. Fink. We were talking about a group of pictures that we were going to make with Al Green, and I talked to Mr. Fink and told him I thought it would be a good idea to get a corporation up so we would have a vehicle which to roll on. After all, I had been in one picture “Copacabana,” and I had loaned money.

Q. The moneys that were put into the Ambassador Production, Inc., was your personal money, was it, Mr. Koch?

A. At that particular time it came out of my personal funds.

Q. Checks were drawn upon your personal account?
A. Yes, sir. [143]

Q. And it was not a partnership loan, was it, Mr. Koch?

A. Well, the partnership was a little short at the time, so I advanced the money personally.

Q. It never was a partnership transaction, was it?
A. Yes, sir.

Q. Was it reflected as such on the books of the partnership?
A. No, sir.

Q. In any way, shape or form?

A. No, sir.

(Testimony of Maurice P. Koch.)

Q. You talked on direct examination in connection with a total of \$25,000.00 advanced to Ambassador Pictures Corporation? A. Yes, sir.

Q. Was that \$25,000.00 all your money?

A. No, sir.

Q. How much of it was your money?

A. \$17,000.00.

Q. How much of it was the money of somebody else?

A. \$8,000.00 came from Producers' Finance Corporation.

Q. And that was advanced by Producers' Finance Corporation to Ambassador Productions, Inc.? A. Right, sir.

Q. A corporate loan from Producers' Finance to Ambassador Productions?

A. That is right, sir.

Q. Do you know when you received your stock in Ambassador [144] Productions?

A. I don't know exactly, but I think you have a record of it there. It was in 1947, I think. I am not sure.

Q. The permit to issue stock, Mr. Koch, is dated April 16, 1947. Would that refresh your recollection as to when you purchased any stock in that corporation?

A. I gave Max Fink a check for the stock at the Friar's Club in Hollywood, and it was some time later that he mailed me the stock of the corporation. I believe you have some letters that we put in evi-

(Testimony of Maurice P. Koch.)

dence that will give you the date. I can't give you the date.

Q. The check you refer to is a check for \$7,000.00?

A. The first check I gave him was for \$7,000.00. That was for the stock of the corporation.

Q. That is Exhibit No. 30. That is the check of December 3, 1947, is that correct?

A. If that is for \$7,000.00, yes.

Q. And that was the only stock that Ambassador Productions issued, is that correct?

A. That is correct. I had all of the stock.

Q. And you were the sole stockholder?

A. I was the sole stockholder, yes, sir.

Q. And from that point on all your dealings with Ambassador Productions, Inc., were as the sole stockholder of Ambassador Productions, Inc., is that correct? [145]

A. Yes, I was the sole stockholder.

Q. All of the testimony that you have given yesterday and today with reference to the affairs of Ambassador Productions, Inc., your participation in those affairs was as the sole stockholder of Ambassador Productions, Inc.?

Mr. Fink: To which I object, your Honor, on the ground it assumes facts not in evidence.

The Court: You have asked the question. He may answer it "yes" or "no."

The Witness: Would you rephrase that? That is taking in a lot of territory.

The Court: Read the question.

(Testimony of Maurice P. Koch.)

(Question read.)

The Witness: I don't know what he is talking about there.

The Court: Reframe your question. I wish you would rephrase that question.

Q. (By Mr. Gillard): Your interest in Ambassador Productions was as the sole stockholder, was it not, Mr. Koch?

A. Yes, I owned all the stock or the firm of H. Koch & Sons owned all the stock of Ambassador Pictures Corporation.

Q. And from that time on your dealings with reference to that corporation or on behalf of that corporation, you were acting as the sole stockholder thereof?

A. May I ask you, what do you mean?

Q. I believe you testified, Mr. Koch, with reference to [146] numerous affairs. You are more familiar with them than I am because I have just rough notes on them. I believe you have testified at length with reference to the affairs engaged in by Ambassador Productions, Inc.

A. That was "Hill of the Hawk."

Q. Is that the only matter that you were concerned with in Ambassador Productions, Inc.?

A. "Hill of the Hawk" was the only thing that Ambassador Productions owned, yes, sir.

Q. In your transactions with reference to "Hill of the Hawk," you were acting as the sole stockholder of Ambassador Productions, Inc.?

(Testimony of Maurice P. Koch.)

A. That is right. "Hill of the Hawk" only.

Q. That "Hill of the Hawk" was never produced, was it?

Mr. Fink: To which I object as being immaterial, your Honor. It so happens that what may have happened years later, including the present time, with regard to that property is not material to this case. I will be glad to go into it if counsel wants to go into it.

The Court: I think he can answer the question "yes" or "no." He has been asked about it already.

(The last question was read.)

The Witness: No, sir.

Q. (By Mr. Gillard): And you eventually sold your entire interest in Ambassador Pictures, both your stock interest and [147] whatever interest the corporation had in the picture, to Mr. Jack Cher-tok?

A. That is correct.

Q. The Producers' Finance Corporation was incorporated on October 20, 1947. You were one of the directors of that corporation, were you, Mr. Koch?

A. Producers' Finance? I am the president.

Q. You were one of the directors and then you became the president, is that correct?

A. I think I was always the president.

Q. And you were one of the original incorporators or directors named in the Articles?

A. I am one of the original incorporators, yes, sir.

(Testimony of Maurice P. Koch.)

Q. And you were immediately elected president of the corporation when the organization was formed, is that correct?

A. If that is the way they do it, that is what happened. But I am the president and always was. I am not too familiar with those things.

Q. With reference to Producers' Finance Corporation, you have testified to certain transactions?

A. Yes, sir.

Q. What were they, sir?

A. Well, Producers' Finance Company loaned money to Ambassador Pictures Corporation for the purpose of "Hill of the Hawk." We were to provide the money for the making of the picture [148] "Hill of the Hawk." We went into Government training pictures, about 30 or 40 of them.

Q. That was with Apex Films?

A. Apex Films, yes, sir.

Q. You testified something with respect to Monogram Pictures, did you not, sir?

A. Yes, we had quite a lot of dealings with Monogram, but we never did actually consummate a deal where we put up any money.

Q. Was that in connection with Ambassador Pictures or in connection with Producers' Finance?

A. That was not in connection with either one of them. There was no money put up. It was again people talking, myself and Monogram and Max Fink, and the people that were interested in making the pictures.

Q. Then to go back to Producers' Finance, the

(Testimony of Maurice P. Koch.)

deals that you have testified to that that corporation was interested in were the "Hill of the Hawk" and the Army training films with Apex Film Corporation? A. That is right.

Q. Were those the only two?

A. Let's see. I have to think for a minute. There was "Hill of the Hawk," Ambassador Pictures; the Army training pictures. Right now I believe that is it.

Q. And in connection with all of those transactions, you were acting as the president of Producers' Finance Corporation? [149]

A. That is correct.

Q. Now, this Monogram picture situation that you testified with reference to, my notes show that you testified that was around the end of 1946 and some time early in 1947. A. That is correct.

Q. That was the situation in which you explored for the purpose of trying to invest a sum of money but the deal fell through, is that correct?

A. That is correct.

Mr. Gillard: Would this be a convenient time to take a recess, if the Court please?

The Court: I would like to run to a quarter past 4:00, if we could.

Q. (By Mr. Gillard): I believe that there was a transaction that you testified to which was entered into on the same date that the Articles of Copartnership were amended. That was another partnership with about 15 people.

A. Yes, 15 or 25. That was the Producers' Syn-

(Testimony of Maurice P. Koch.)

dicade back in 1944. I promoted \$15,000.00 on that deal.

Mr. Fink: The agreement is in evidence. I think it is Exhibit 3, isn't it?

Mr. Gillard: Oh, yes, Exhibit 3 in evidence, an agreement of the Koch partnership dated the 23rd of October, 1944, between Dave Sebastian and about 13 or 14 other people.

Q. In that connection, Mr. Koch, you and the other persons [150] named in that agreement deposited the amount of money specified for each person with Mr. Grupp, did you?

A. That's correct.

Q. And the purpose of this agreement was that Mr. Sebastian was named the general manager of the partnership.

A. That is 1944. The agreement speaks for itself.

Q. Do you recall that he was the manager?

A. He had a lot to do with it, but I can't remember the exact title that was in there.

Q. The purpose of it was to have him explore a Sid Broad production, is that correct?

A. That is right.

Q. After exploring that for a few months, he determined no agreement could be reached with reference to that production, is that correct?

A. I went down to Los Angeles on that several times and I did a lot of exploring on that thing myself. It looked like we couldn't tie the ownership of the Mark Twain series down. One relative

(Testimony of Maurice P. Koch.)

had one, somebody else had another, and we were afraid of being sued after we made a picture by somebody who might have held title to that picture, and Sid Broad himself could not tie the title down. And we worked on that for months and months trying to tie the titles down, but we couldn't have done it. If we could have done it, we could have made the picture, the series, and so we gave everybody [151] their money back and we paid our own expenses on the deal. Everybody got 100 cents on the dollar back, but I promoted all the money for that picture.

Q. As a matter of fact, what happened was that Mr. Sebastian was charged with the responsibility of determining the advisability of investing this fund, was he not?

A. Well, I don't remember, but the way it turned out, I suggested that everybody get their money back. I can't remember the details in that deal. It was quite some time ago.

Q. I will refer you to Exhibit A for identification, Mr. Koch, and ask you to read that paragraph there with reference to the partnership.

A. Yes, that is in line with what I told you, only it says, "Mr. Sebastian reported to Mr. Grupp and me that he could not get the titles to the pictures."

Q. Let me read from this and ask you a question, Mr. Koch.

A. All right, sir.

Q. "Between the date of October 23, 1944, and January 18, 1945, the said David Sebastian periodically reported progress on his attempts to secure a satisfactory arrangement with regard to the Sid

(Testimony of Maurice P. Koch.)

Broad production to Maurice P. Koch or his attorney, Morris M. Grupp, and thereafter, some time during the middle of January, 1945, David Sebastian reported to Morris Grupp that he could not meet the conditions outlined by Maurice P. Koch to the investors in the Producers' Syndicate relative to the Sid Broad [152] productions and in line therewith on January 18, 1945, Morris M. Grupp as trustee returned the money to the investors." Is that correct? A. That is right.

Q. So that this money that was put up was put up by a trustee of your selection, Morris M. Grupp, with instructions to hold it pending further determination of what should be done with it, is that correct?

A. No, not exactly. It doesn't work that way. I mean, if Morris Grupp decided to make apple carts out of the \$50,000.00, I think I would object strenuously to that.

Q. I do not believe that was my question, sir. I will withdraw that question. The contract speaks for itself. In any event, your money was put up by you in trust with Morris M. Grupp, the production fell through, and the money was returned to you, is that correct? A. That is right?

Mr. Gillard: Except for a few tag ends, if the Court please, I think I am finished.

The Court: We will take a recess until 10:00 o'clock tomorrow morning. Remember the admonition heretofore given you. [153]

Wednesday, November 28, 1956—10:00 A.M.

MAURICE P. KOCH

a plaintiff herein, being previously sworn, resumed the stand and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Gillard:

Q. Mr. Koch, in the production of the moving picture "Copacabana," who was the producer?

A. The producer was Sam Coslow.

Q. What are the functions of a producer?

A. The function of a producer is to see that the entire picture is carried out, all the functions of the entire picture is carried out, to watch the budget, watch the costs, and keep a good eye on the director.

Q. He is, in effect, the over-all business manager of the picture? A. No, sir.

Q. Who occupies that function?

A. The executive. There is an executive producer.

Q. An executive producer? A. Yes, sir.

Q. He is the business manager of the affair, is he? A. Yes, sir.

Q. Well, the functions that you have described for the producer, like watching the budget, watching costs, and so on—— [154]

A. And watching the direction of the picture, the production of the picture.

Q. What would the associate producer do?

A. The associate producer would assist the pro-

(Testimony of Maurice P. Koch.)

ducer. In other words, the producer would be the manager of the picture and he would manage the picture, and the associate producer would assist him.

Q. Who was the director of the picture?

A. Al Green.

Q. What were the functions of the director?

A. Al Green, the director, would sit on every set and direct the actors that were at the camera, in front of the camera. He would take the picture, scene by scene, and try to explain and tell the actors exactly what they had to do at each scene.

Q. What other technical staff is there employed in the making of the picture? First, just by titles, Mr. Koch.

A. Well, they have writers, they have heads of costumes, they have heads of sets, they have a good cost accounting staff, they have got—well, they've got a lot of help all over the place, assistants—under the assistant producer.

Q. And that would include a regular force for the dance routines?

A. That is right. They would have teachers there to teach the girls how to dance. They would have dance instructors. They would have make-up artists there, head make-up artists [155] that were very big people.

Q. And property men?

A. Property men, yes, sir. They would have juicers there to take care of the electrical works, people that move things around.

(Testimony of Maurice P. Koch.)

Q. After the filming, they have people especially trained for the purpose of cutting and assembling the film?

A. That is right, they have filming editors and cutters. That is in the laboratory department.

Q. During the course of the transactions that you described to the jury with reference to these various productions, you considered your business was financing, didn't you, Mr. Koch?

A. My business was financing, but I was very much interested in the production of the picture because I had quite a bit of money in there.

Q. In connection with Producers' Finance Corporation, you referred to some dealings you had with Apex Films and some Army training films, is that correct?

A. That is right, sir.

Q. The contract for the making of those films was between the Army and Apex Films Corporation, was it not, Mr. Koch?

A. That is right, sir.

Q. Did you have any interest in Apex Films Corporation?

A. No, I had no interest in Apex Film Corporation outside of financing them on these [156] pictures.

Mr. Gillard: May this letter dated January 29, 1948, be marked as defendant's next in order?

The Court: In evidence? Is it being offered?

Mr. Gillard: By stipulation it may go into evidence.

The Court: Exhibit H.

(Testimony of Maurice P. Koch.)

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit H.)

Q. (By Mr. Gillard): I will hand you Exhibit H, Mr. Koch. This is a letter, is it not, sir, from you, dated January 29, 1948, that is, from Producers' Finance Corporation, by M. P. Koch, Director, to Mr. Jack Chertok, setting forth in a preliminary form the basis of your understanding of advancing funds to the Apex Corporation?

A. That is right, sir.

Q. And the letter recites that Apex had these preliminary arrangements with the Army and was going to produce these films for the Army?

A. That is right.

Q. In that connection, then, the money that you testified about yesterday, this money from Pacific National Bank that you assisted in procuring, that million dollars of financing or thereabouts—

A. Yes, sir.

Q. —that money went to Apex Film Corporation?

A. That money went direct to Apex Film Corporation, yes, sir. [157]

Q. And you were interested in arranging that that money was advanced by the Pacific National Bank to Apex so that your loan could be to Apex and you could help to make a profit upon that, is that so?

(Testimony of Maurice P. Koch.)

A. That is right. I promoted the loan with Pacific National Bank.

Q. The details of the loan were finally worked out, I presume, between Apex and Pacific National Bank?

A. That is correct.

Q. The Pacific National Bank was interested in the credit standing of Apex Film Corporation, not in Producers' Finance Corporation?

A. Pacific National Bank was naturally interested in knowing all about Apex Film Corporation, and Jack Chertok—if I had not brought Mr. Chertok or Apex Film into our bank and he went in there cold, he would never have gotten the money.

Q. That may be, sir, but you were no part of the final loan transaction itself, were you?

A. No, not of the loan of the Pacific National Bank, not the loan that they made to Apex Film. Might I add that all of these things were predicated upon them getting the money for the picture and a loan being made.

Q. During the years 1946 and 1947 was any money loaned or invested by H. Koch & Sons, with the exception of money put into [158] "Copacabana"?

A. 1946 and 1947?

Q. Yes, sir.

A. Well, I think the ledger sheet will show for itself. We bought stock and loaned money to Producers' Finance Company, but I haven't got the dates clear in my mind.

Q. That was in 1948, Mr. Koch?

(Testimony of Maurice P. Koch.)

A. It was either 1947 or 1948. I think the account 40 will show that, our ledger sheet.

Q. With reference to the money advanced by Producers' Finance Corporation, do you have that check for \$8,000.00 that you referred to yesterday?

A. Yes, sir, I believe we have.

Mr. Gillard: Do you have that check?

Mr. Fink: I showed it to you yesterday.

Mr. Gillard: As defendant's next in order, I will offer the check of Producers' Finance Corporation by Maurice P. Koch, President, dated July 8, 1948, in the sum of \$8,000.00 made payable to Max Fink.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Q. (By Mr. Gillard): I will hand you Exhibit I, Mr. Koch, and also Plaintiffs' Exhibit 34. Is Exhibit I the check that was referred to and mailed to Mr. Fink in connection with Exhibit No. 34?

A. Yes, sir. [159]

Q. Of the total amount of money that was spent for the purchase of "The Hill of the Hawk" and for your stock in Ambassador Pictures Corporation, that was a total of \$25,000.00, is that so, sir?

A. A total of \$25,000.00 was spent for "Hill of the Hawk."

Q. \$17,000.00 of that was your money which went into Ambassador Pictures Corporation and from there was used by that corporation to buy the book, is that so?

(Testimony of Maurice P. Koch.)

A. \$7,000.00 was paid for the stock, and also that \$7,000.00 was used by the corporation for the first down payment of "Hill of the Hawk," and subsequent to that the other \$18,000.00 was loaned to Ambassador Pictures to buy "Hill of the Hawk."

Q. That \$25,000.00 was all subsequently returned, was it, Mr. Koch? A. That is right.

Q. The \$8,000.00 represented by this check, Exhibit I, the last one just shown to you, was returned to Producers' Finance Corporation, is that correct?

A. That is right.

Q. The other \$17,000.00 was repaid to you personally, was it? A. That is right, sir.

Q. And that did not go back to H. Koch & Sons or through its books? A. That is right.

Q. During the period 1946 and 1947 was any picture produced [160] by virtue of any financing activities that you have testified to with the exception of "Copacabana"?

A. 1946 and 1947? No. We worked on a lot of pictures but they were not completed, produced.

Q. Mr. Koch, did you ever make any demand upon Mr. Sebastian for the return of the \$17,500.00 advanced to him?

A. No, sir, there was no need of that.

Q. Did you ever make any demand for its return? A. No, sir. May I explain that?

Mr. Gillard: I think your counsel will take care of that. Thank you, Mr. Koch.

(Testimony of Maurice P. Koch.)

Redirect Examination

By Mr. Fink:

Q. Mr. Koch, I have some questions, too, if you don't mind. You just mentioned that you wanted to explain why you had not made a demand upon Mr. Sebastian for \$17,500.00. Will you explain that to us, Mr. Koch?

A. Yes, sir. That money was advanced, that \$17,000.00 was advanced to Mr. Sebastian. \$10,000.00 of that went to Coslow and Hersh to buy stock in the Beacon Pictures Corporation. If the picture was made and completed and profits were forthcoming, then that money, when the company was dissolved, that money would be forthcoming back to me, plus the interest in the picture, and if the company did not make any money and they did not get any money back, that money would be a loss. I mean, there would be nothing coming back to me. That was [161] understood. The same thing applied with the \$7,500.00 that Sebastian and Hersh received for expenses to get the picture rolling. In other words, this \$17,500.00 was treated exactly the same as the \$80,000.00 that we put into Beacon Pictures Corporation, and that is why we never asked for the money back, because there was nothing forthcoming from the picture.

Q. Mr. Koch, I will run through a few things that you testified about yesterday. Yesterday counsel asked you about gross sales, I believe, of H. Koch & Sons, the copartnership, and showed you Exhibit

(Testimony of Maurice P. Koch.)

C, a partnership return. I think you told him that gross sales in the year 1947, in accordance with that exhibit, were \$555,532.46. What was the net income for the entire partnership that year?

A. The income was \$19,223.18.

Q. That was divided between how many partners?

A. Four partners.

Q. Around \$4,780.00 each?

A. That is right.

Q. For the year?

A. That included our salaries, I believe.

Q. I note here in the year 1946——

The Court: What do you mean, it included your salaries? You mean your salaries were in addition to that, do you not?

A. I don't believe our salaries were in addition to that, [162] Your Honor.

Mr. Fink: It is a partnership.

The Court: I want to know what you mean by "included our salaries."

A. In a partnership our profit includes our salaries. In other words——

Q. I don't want any discussion about it. Did you get any salary in addition to the \$19,000.00; yes or no?

A. No, sir. No, sir.

Q. (By Mr. Fink): I will show you here on Schedule I of the same partnership return, Exhibit C, "H. M. Koch, \$4,805.48."

A. That is part of the salary, that is right.

Q. W. E. Koch, also, \$4,805.00?

A. Yes.

(Testimony of Maurice P. Koch.)

Q. M. P. Koch, also, \$4,805.00? A. Yes.

Q. Rebecca Koch, \$4,805.00?

A. That is right.

Q. Plus the odd cents. I notice in 1946 that your tax return shows a net income of \$115,000.00. Will you tell me, Mr. Koch, was the luggage business that you were in at that time going downhill?

A. The luggage business in 1946 was better than it was in 1947.

Q. In 1947 you made about \$4,805.00 apiece. What happened [163] in 1948?

A. In 1948 it was worse than 1947.

Mr. Gillard: If the Court please, I am going to object to this line of questioning, not because I want to keep it from the jury, but because I do not think it is relevant to the issues in the case. The exhibits, of course, are not limited in purpose. I put them in to show the gross activity of Mr. Koch.

The Court: There is no question before the Court. The answer is in. Proceed.

Q. (By Mr. Fink): Mr. Koch, at the end of 1947 what was the cash position of H. Koch & Sons, a partnership, on December 31, or thereabouts, of 1947?

A. We had practically nothing in the bank. I believe we owed money.

Q. Did you intend during the years 1946 and 1947 to get into and be a part of the motion picture business?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

(Testimony of Maurice P. Koch.)

The Court: I will permit the answer "yes" or "no."

The Witness: Yes.

Q. (By Mr. Fink): What was your reason for that?

A. Well, I was on the War Production Board during the war. I made four or five trips to Washington every year.

The Court: That is going a little far afield, counsel. [164]

The Witness: I want to explain this situation of the business.

The Court: I do not want to hear a long story of things that are not pertinent to this inquiry, please.

Q. (By Mr. Fink): What was your reason for becoming active in this motion picture finance business?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

The Court: I will permit him briefly to give an answer.

The Witness: Well, I had every reason to believe that with the number of manufacturers, the increased number of manufacturers going into the luggage business that the supply was going to overwhelm the demand, and we had to get into something else to make money or we were going to be out of luck.

Q. (By Mr. Fink): Did you eventually go out of the motion picture finance business?

(Testimony of Maurice P. Koch.)

A. Yes, sir.

Q. When? A. Well, in——

Mr. Gillard: I object to that, if your Honor please, as incompetent, irrelevant and immaterial. The issues here are 1946 and 1947. We haven't engaged in transactions up to the present time.

Mr. Fink: Counsel asked the witness yesterday about [165] selling out to Jack Chertok, your Honor, which happened in 1949, and I thought we should establish just when he discontinued——

The Court: I think it calls for a conclusion and the objection may be sustained.

Q. (By Mr. Fink): Mr. Koch, counsel asked you yesterday about your activities in selling luggage in 1946, and I think you told counsel that you were selling luggage in 12 Western States. How much of your time was devoted to selling in 1946?

A. In 1946 everything was on allocation.

Q. What do you mean by that?

A. Well, luggage was practically impossible to be obtained. The war was over, and we allocated luggage to all our customers. In other words, we gave them a quota and shipped them that quota every month. Never called on hardly anybody.

Q. In 1947 I believe you told counsel you engaged agents to sell on commission?

A. That is right.

Q. Yesterday counsel inquired of you with regard to a law suit, a judgment against Beacon that was filed in the Beacon Pictures Corporation, a

(Testimony of Maurice P. Koch.)

bankruptcy proceeding. He read to you only four lines on page 38 of your deposition. Starting at page 38, line 20, to and including line 24:

“Q. Mr. Koch, this suit was—the basis of this suit was two promissory notes signed by Beacon Pictures [166] Corporation, each in your favor, one for \$50,000.00 and one for \$30,000.00, wasn’t it?

“A. That is correct.”

Now, Mr. Koch, I want to read to you the very next five lines of your deposition:

“Q. And those two notes were the basis of the action filed against Beacon Pictures Corporation, isn’t that right?

“A. Well, I think my attorney can tell you more about that than I can. He filed that suit. I turned the whole thing over to him and walked away, and that is the truth.”

Was that your testimony?

A. Yes, sir.

Q. Did you at any time attempt to direct your attorneys as to what legal theories should be pursued in this situation? A. No, sir.

Q. By the way, you mentioned that you sold out Ambassador Pictures and “Hill of the Hawk” to Jack Chertok. Do you know whether or not he has ever produced or ever will produce the feature picture called “Hill of the Hawk”?

A. I believe he is working on it right now.

Q. I think you told us that you had your attorney, Mr. Grupp, in San Francisco incorporate Producers’ Finance Corporation?

(Testimony of Maurice P. Koch.)

A. That is right.

Q. And the incorporators of that were yourself, Mr. Grupp [167] and Mr. Grupp's secretary?

A. That is right.

Q. This was done in 1947, wasn't it?

A. 1947, yes, sir.

Q. What was the purpose of forming this corporation?

A. This corporation was formed to finance motion pictures.

Q. What do you mean by financing?

A. To advance the money for the pre-production of motion pictures, with participation in the motion pictures.

Q. Did you intend to obtain outside capital through this corporation? A. Yes, sir.

Q. Did you obtain outside capital through this corporation? A. Yes, sir.

Q. When I say "outside," I mean outside the Koch family.

A. That is right, sir.

Q. Did you ever receive any salary from Producers' Finance Corporation? A. No, sir.

Q. Did you ever receive any salary from Apex Films or Ambassador Productions or Beacon Pictures Corporation or any of the other corporations that have been mentioned in this case?

A. No direct salaries.

Q. And in speaking about your past experience and knowledge [168] of the picture business, among

(Testimony of Maurice P. Koch.)

other things, Mr. Koch, yesterday you mentioned your father-in-law. You did not tell us, I don't believe, what his relationship was to that. Was your father-in-law in the picture business?

A. Yes, sir, he was one of the big producers in his day.

Q. What was his name?

A. Arthur Harry Sebastian.

Q. What was the nature of the business he was in?

A. He was a producer and actually produced many pictures.

Q. So far as other members and relatives in your family are concerned, were other men in the theatre and the theatrical business?

A. Yes, sir.

Q. Were any of them, for example, in the theatre business?

A. Yes, sir.

Q. To what extent?

Mr. Gillard: I will object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Fink): In your earlier years, Mr. Koch, did you have the opportunity of learning from members of your family facts concerning the motion picture industry and the motion picture business?

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness. [169]

The Court: Sustained.

Q. (By Mr. Fink): I think you told counsel

(Testimony of Maurice P. Koch.)

yesterday that you never made a picture yourself and you do not know anyone who ever has. What did you mean by that?

A. There is no one man who can make a picture. It takes an organization.

Q. Mr. Koch, I think you told us that United Artists Picture Corporation sells pictures worldwide, and that the picture "Copacabana" was entrusted to them for sale throughout the world, is that correct?

A. That is right.

Q. After you learned from the sales of "Copacabana," United Artists, that the picture was a total loss so far as your money was concerned in the year 1947, did you file an amended partnership return for the year 1947?

A. I believe we did.

Q. I will show you here what is called "Amended Return, United States Partnership Return of Income, 1947."

A. Yes.

Q. The caption is, "Amended Return." On the last page appears a signature.

A. That is right.

Q. Is that your signature?

A. Yes, sir.

Q. Is this the amended return that you [170] filed?

A. It evidently is, yes.

Q. For H. Koch & Sons?

A. Yes, sir.

Q. It shows a net loss for the year of \$55,776.82, is that correct?

A. That is correct.

Q. For the partnership business.

Mr. Fink: May I offer this as plaintiffs' Exhibit next in order?

Mr. Gillard: If the Court please, this is, I be-

(Testimony of Maurice P. Koch.)

lieve, rendered irrelevant by the pleadings. The answer of the Government admits that a loss of \$75,000.00 was incurred and a claim was made for that by the partnership. There is no issue in the case with respect to this matter.

The Court: The objection is overruled. It may be admitted and marked Exhibit 35.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 35.)

Mr. Fink: We have no further questions at this time, your Honor.

Mr. Gillard: No further questions.

The Court: You may step down. Call your next witness, please.

Mr. Fink: We are calling a witness from the witness room, your Honor. Your Honor, when this action was first called on [171] the Master Calendar, Mr. Grupp was permitted to withdraw as counsel in the case due to the fact that he was going to be a witness, and I do not believe that record has come through to your Honor as yet. He is not an attorney in the case at this time.

The Court: Call your witness, Mr. Fink, please.

MORRIS M. GRUPP

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Fink:

Q. What is your name, please?

A. Morris M. Grupp, 350 Mills Tower, San Francisco.

Q. What is your business?

A. I am an attorney at law.

Q. How long have you practiced in the State of California? A. Since 1927.

Q. Do you know the Koch family?

A. I do.

Q. How long have you known them?

A. I have known the Koch family since approximately 1920.

Q. Thirty-six years? A. That is correct.

Q. Have you been the counsel for H. Koch & Sons, a copartnership?

A. The present partnership, yes. [172]

Q. I show you here Exhibit 1, a copartnership agreement between Rebecca Koch, Maurice P. Koch, Harold M. Koch, and William L. Koch, and ask you if you drafted that document.

A. Yes, sir, I drafted that document.

Q. I will show you an amendment which purports to be executed on the 23rd of October, 1944, by those same people, amending the partnership agreement, originally this Exhibit 1. Did you draft this agreement? A. I did.

(Testimony of Morris M. Grupp.)

Q. Do you recall the circumstances leading up to the amending of the partnership agreement?

A. Yes, to some extent, I imagine.

Q. What were those circumstances insofar as leading up to this amendment, pursuant to which this amendment was prepared? I will withdraw the question. What occasioned the drafting of this amendment to the original agreement?

The Court: I take it that that is a conclusion. The agreement was signed. There is no question about it. It is a completed fact. How can this witness testify to conclusions as to reasons why it should be done?

Mr. Fink: I suppose it will speak for itself, your Honor.

Q. Mr. Grupp, after the 23rd day of October, 1944, did you have any dealings with the Koch family with regard to the motion picture finance business? A. Yes. [173]

Q. I will show you here an agreement of partnership which bears date of the 23rd day of October, 1944, and which bears a number of signatures, including one that purports to be your signature. This is your signature, is it?

A. That is correct, that is my signature.

Q. Did you prepare this agreement?

A. I prepared that agreement.

Q. Did you act under this agreement?

A. I did.

Q. Mr. Grupp, we are concerned here with certain transactions that led into the year 1947. Do you

(Testimony of Morris M. Grupp.)

recall transactions involving H. Koch & Sons and Beacon Pictures Corporation and a picture, "Copacabana"?

A. Yes, that was one of the later—not one of the later ones, but that was some time after the original transaction that was set forth in the exhibit that you just showed to me.

Q. In between the date of October 23, 1944, and the time that this Beacon Pictures Corporation—"Copacabana" matter came up, there were other considerations, were there not, which you investigated?

A. That is correct.

Q. Turning to this matter of Beacon Pictures Corporation and a picture called "Capacabana," do you recall whether or not you were consulted in connection with that matter?

A. Yes, I was consulted by the Koch family. I had various [174] conferences.

Q. Approximately when were you first consulted and did you first confer with regard to that matter?

A. As to the date, I would say approximately the middle of 1946 or somewhere along in there.

Q. Let us put it this way: Do you know whether or not a picture called "Copacabana" was made?

A. Yes.

Q. You saw the picture?

A. Yes, I did. I saw it being made.

Q. Were your conferences and consultations prior to the making of that film?

A. I would say about six months before that,

(Testimony of Morris M. Grupp.)

or four months, five months, somewhere along in there.

Q. In any event, we are talking about a situation that occurred approximately ten years ago?

A. Yes.

Q. We do not expect you to be exactly accurate on it. At that time whom did you represent?

A. I represented the copartners in the Koch enterprise and the Koch family.

Q. That was then H. Koch & Sons?

A. That is correct.

Q. The copartnership with which we are concerned here? A. That is right. [175]

Q. Did you meet a man named David Hersh?

A. Yes, Mr. Hersh came to San Francisco when I originally met him in my office. We had an evening conference, as I recall it, which lasted all evening.

Q. Did you discuss the matter of this proposed arrangement with Mr. Hersh at that time?

A. That is right. That was the purpose of his visit here.

Q. Did you perform that activity as counsel for H. Koch & Sons? A. Yes.

Q. Did you talk to one David Sebastian at or about the same time?

A. Yes, I think David Sebastian brought Mr. Hersh to San Francisco. I know they came together. In the conference that we had, both Mr. Hersh and Mr. Sebastian were present, I think Mr. Maurice Koch was present. I do not recall any of the other Koch family at that meeting.

(Testimony of Morris M. Grupp.)

Q. Do you remember that H. Koch & Sons put some money up for an interest in the film "Copacabana"? A. Yes.

Q. Prior to the time this money was advanced, did you discuss matters relative to that transaction with members of the family or partnership other than Maurice Koch?

A. Yes—well, all the members of the partnership, as I recall it, were at one time or another in one or two conferences [176] together.

Q. Following that time, Mr. Grupp, did you have occasion to be consulted in connection with other motion picture transactions by H. Koch & Sons?

A. Yes, there were quite a number of them.

Q. I will call your attention particularly to the formation of a company called Producers' Finance Corporation.

A. Yes, that was a corporation as distinguished from the Producers' Syndicate. I think the original was Producers' Syndicate. If that is the corporation that was organized, then that is the one I think I organized.

Q. I will show you here Exhibit 25, which purports to be a certified copy of Articles of Incorporation of the Producers' Finance Corporation.

A. Yes.

Q. It purports to have been filed in the office of the Secretary of State on the 20th day of October, 1947? A. That is right.

Q. I will show you the names of the incorpora-

(Testimony of Morris M. Grupp.)

tors, which appear to be Morris Grupp, Maurice P. Koch, and Bernice E. Phillips.

A. That is right. Bernice E. Phillips was my secretary at the time.

Q. Did you and your secretary named here at all times act on behalf of H. Koch & Sons in organizing this corporation? [177]

A. That is right.

Q. At the time that this corporation was organized, I take it it did not have capital at that time, is that correct?

A. At the time it was organized? No, excepting that the Kochs advanced and paid all the costs of the incorporation.

The Court: By incorporation you mean the filing of the Articles in Sacramento?

A. The filing of the Articles in Sacramento and the subsequent applications that were filed for the issuance of stock.

Q. (By Mr. Fink): Did you obtain a permit to issue stock in that company from the Department of Investments of the State of California?

A. I did.

Q. When did you obtain such a permit?

A. The permit was issued on February 26, 1948.

Q. The corporation we noted was incorporated on October 20, 1947.

A. Yes. Then an application follows, as a rule, which it takes some time to act on.

Q. In the several months that intervened between the incorporation of the company and the

(Testimony of Morris M. Grupp.)

obtaining of the stock permit, were any persons, firms or corporations to your knowledge interested in Producers' Finance Corporation other than H. Koch & Sons?

A. Not during that interval of time. During that interval [178] of time it was entirely their corporation.

The Court: So that the jury may understand, Mr. Grupp, what organizing a corporation means, that is done by an attorney preparing a paper which is called the Articles of Incorporation. The parties or the people in your office sign it, and it is mailed to Sacramento.

The Witness: That is correct.

The Court: That is called forming a corporation.

The Witness: That is the forming of the actual corporation.

The Court: Thereafter, if there is any money to be invested, an application must be made to the Corporation Commissioner, and he thereafter issues a permit that the stock may be issued upon certain conditions.

The Witness: That is right, and then if I might follow it from there, as a rule when the corporation gets into action or becomes activated, as a rule the incorporators, if their attorney is secretary, he will step out of the picture and the new directors are voted in and they proceed with their business.

The Court: Until the permit to issue stock is made and the stock is issued, all that is done is the filing of the Articles of Incorporation.

(Testimony of Morris M. Grupp.)

The Witness: That is correct.

Mr. Fink: May I offer this stock permit of Producers' [179] Finance Corporation as plaintiffs' next in order, your Honor?

The Court: Exhibit 36.

(The document referred to was thereupon received in evidence and marked Plaintiffs' Exhibit 36.)

Q. (By Mr. Fink): Mr. Grupp, do you know a Mr. Jack Chertok? A. Yes.

Q. When did you meet him?

A. I would imagine it was either in August or September of 1947. It preceded the date of the organization of Producers' Finance.

Q. Did you meet him in a professional capacity, that is, in pursuit of your profession as an attorney?

A. Yes.

Q. For whom were you acting at the time?

A. For the Koch family and partnership.

Q. Did you have occasion to discuss financial matters pertaining to the picture business with him?

A. I did.

Q. Where did you meet him, by the way?

A. I met him at his office in Los Angeles.

Q. Did you go there to see him?

A. Yes, that was the only purpose of that trip.

Q. Did you have more than one conversation with Mr. Chertok?

A. I cannot be certain whether the second conversation I had in San Francisco was with Mr.

(Testimony of Morris M. Grupp.)

Chertok or one of the members [180] of his staff with reference to a loan that was made with Pacific National Bank. I tried to recollect that, Mr. Fink. I am not certain Mr. Chertok came to San Francisco at that time. My memory was—my best memory would be that he did, and that I met him twice, and that I met another member of his staff once in San Francisco. Once I know I met Mr. Chertok in Los Angeles.

Q. Did you have any financial dealings with Mr. Chertok on behalf of H. Koch & Sons?

A. Yes.

Q. What was the nature of those dealings?

A. Well, it started with this conversation in Los Angeles, where Mr. Chertok explained to me that there was a vital need in the motion picture business of what they called funds, pre-production funds, which he explained were the funds which were necessary to gather a picture to the point where the camera starts to turn, and that that was the most difficult money to obtain, particularly in instances where there were no big stars, big names connected with the picture, and that there was a crying need for any organization that could supply that type of funds, and that he was in that position and would like to get some pre-production money. He gave us his background. I remember he had been with one of the picture studios—I do not know whether it was MGM or one of them—for many, many years, and he himself would be vitally interested in such a [181] group, if such a group were

(Testimony of Morris M. Grupp.)

put together, in joining that group, even to the extent of putting in a certain percentage of his own profits in such an organization upon which he or other producers could later draw.

Then subsequently there were some arrangements made through the bank which the Kochs banked at, the Pacific National Bank, and conferences held there with reference to backing some pictures or financing some pictures which I think Mr. Chertok was making for one of the Departments of the United States Government. I don't remember whether it was the Army or the Navy. But arrangements on that were made in 1947, as I remember it, and then it was quite awhile—I mean, the bank had to commit themselves before Chertok could go ahead and bind himself to the contracts with the Government, which I understand was ultimately done and carried through. Then there were moneys advanced to Mr. Chertok by the corporation at a later date.

Q. Do you know whether or not the Signal Corps and Army and Air Corps training films were produced? A. Yes.

Q. Some time prior to the production of those films I assume arrangements were made with the Government for the production of them?

A. Yes.

Q. As I think you told us, your arrangements for financing [182] and banking, so far as the production of those films were concerned, were made prior to that time?

(Testimony of Morris M. Grupp.)

A. Yes. The bank—first, there was quite a lot of money involved there, as I remember it, and the bank was vitally interested in the background of Mr. Chertok. They discussed the matter, Mr. Lee Master, I think it was, of the bank, with Mr. Koch on several occasions. I was with them on one or two occasions; I gave him the answer to some of the questions as I understood them, when I had conferences with Mr. Chertok and then the bank, as I recall, finally committed themselves to this financing after this investigation. Then he completed his contracts with the Government.

Q. Could you define this a little more closely, just when these discussions with Mr. Chertok were had and also approximately when it was that the bank as well as the Koch family and the corporation committed the financing necessary to make these films?

Mr. Gillard: I object to that as compound and complex, if the Court please.

Mr. Fink: I merely wanted the time set.

The Court: Does the witness understand the question?

The Witness: I think I understand the question. As I recall, the conference with Mr. Chertok preceded the filing of the corporation papers in Producers' Finance, and Producers' Finance Corporation was organized as a means of carrying into [183] practice such arrangement as could be made with Mr. Chertok.

Q. (By Mr. Fink): I want to call your atten-

(Testimony of Morris M. Grupp.)

tion to the fact that Exhibit 25, the Articles of Incorporation of Producers' Finance Corporation, indicates that they were filed with the office of the Secretary of State of California October 20, 1947.

A. I would say my memory would be it would be between 60 days and 90 days before that.

Q. In any event, these arrangements for financing with the bank, as well as with the Koch family, were made some time, you say, prior to this October 20, 1947, date?

A. Yes. In other words, the first conference with Chertok in Los Angeles, I would say, preceded that by 60 or 90 days. Then after that the question of the Signal Corps pictures, which I now recall that you mention it, came into the discussion.

Q. Did these discussions occur in the year 1947?

A. Yes.

Q. Were these financial commitments made with regard to financing these training films made in 1947?

A. My memory is the bank concluded—I think it took about 90 days or something like that, or more—90 to 120 days to consummate the contracts with the Government after the bank had committed themselves to the financing.

Q. Prior to October 23, 1944, what had been the business of H. Koch & Sons? What business were they in? [184]

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: I think I will permit him to answer.

(Testimony of Morris M. Grupp.)

The Witness: H. Koch & Sons were manufacturing luggage of various types prior to 1944 and as long as I remember them, the family.

Q. (By Mr. Fink): After the amendment, after October 23, 1944, what was the business of H. Koch & Sons?

The Court: I think that calls for a conclusion. I think this witness is not able to testify to that.

Q. (By Mr. Fink): Were all of the activities which you devoted to this motion picture financing, the time that you spent professionally, was all of this time and all this activity conducted by you as counsel for H. Koch & Sons?

A. Yes, at all times. I do not think that any of the costs, any of the costs that were expended there were advanced by either of the corporations or by any other person other than the Kochs.

Mr. Fink: No further questions.

The Court: We will take a recess at this time.

(Recess.)

Mr. Fink: During the recess my attention was called to an oversight. May I reopen?

The Court: All right.

Q. (By Mr. Fink): Mr. Grupp, during the year 1947, the year [185] in question, were you in touch with Mr. Maurice P. Koch in the course of that year? A. Yes.

Q. To what extent? Will you describe your contact with him? A. During the year 1947—

Mr. Gillard: I will object to the question as

(Testimony of Morris M. Grupp.)

being too broad and general, and not being limited to the activities in connection with the issues in this case.

Mr. Fink: I will withdraw the question and reframe it.

Q. Mr. Grupp, during the year 1947, did you have occasion to discuss motion picture matters with Mr. Maurice P. Koch? A. Yes.

Q. Did you also during that year have occasion to discuss motion picture affairs with other members of the partnership of H. Koch & Sons?

A. Yes.

Q. Insofar as your discussions with Maurice P. Koch are concerned on motion picture matters, on approximately how many occasions during the year 1947, did you discuss such matters with him?

A. I would venture to say fully a hundred times between personal, telephone calls and conferences.

Q. Were those telephone calls local calls or long distance calls?

A. Many of the phone calls—I would venture to say half of [186] them—were from Los Angeles.

Q. Did these 100 times or so during that one single year, the calls and discussions you had, relate to the motion picture business?

A. Entirely to the motion picture business.

Q. Was it a rather constant activity or were there gaps in between?

A. It was almost constant, every two or three days, sometimes day after day, sometimes several times a day. It was a constant activity on that dur-

(Testimony of Morris M. Grupp.)

ing practically the whole year, as I recall, one thing or another.

Mr. Fink: That is all.

Cross-Examination

By Mr. Gillard:

Q. Mr. Grupp, do you have a day book showing your contacts with Mr. Koch?

A. I do not know whether I have a day book from that time past. If I do, it would be in the storage of the basement of the 417 Market Street building, where I have stored old records. I would venture to say, Mr. Gillard, that the day book would not show numerous phone calls which I received at my home, 12:00 o'clock midnight, 2:00 o'clock in the morning, at any time almost during a good portion of that year.

Q. Mr. Grupp, I gather the day book would show the conferences in your office that you had.

A. If conferences were scheduled, it would show that. [187]

Q. You did not consult that day book, I take it, prior to your testimony today?

A. No, I did not.

Q. When was the first time that you went to the bank with Mr. Koch with reference to the financing for Apex Films?

A. I would venture to say it was within 30 days or 60 days before that corporation, Producers' Finance, was formed. I think it was formed some time in the later part of October. It followed within

(Testimony of Morris M. Grupp.)

several weeks at least of my first visit to Mr. Chertok in Los Angeles.

Q. Do you know of your own knowledge that the bank advanced money in that connection to Apex Film Corporation?

A. Yes. You mention Apex. I think that was the name.

Q. The money was not advanced to Producers' Finance, was it?

A. No, it was advanced to whatever company Mr. Chertok was operating under at that time.

Q. Do you know when money was advanced by the bank?

A. No, I do not know when it was, as my memory serves me now. I mentioned before, after the bank committed itself to make these loans, Mr. Chertok proceeded to complete his contractual arrangements with the Signal Corps, I would imagine some 60, 90 or 120 days intervened. I would imagine they must have gotten the money early in 1948.

Q. Did the bank require that the Apex Corporation have on hand the pre-production money prior to its loan? [188]

A. I do not recall that. I didn't handle the bank papers for the Apex Company and I do not know what their requirements precedent to their making the loan was. There was some moneys I know that came to Apex from Producers' Finance, but just what that pertained to at that time I do not recall.

Q. Mr. Grupp, after all of your experience in the motion picture financing business, acting as the

(Testimony of Morris M. Grupp.)

attorney for the Koch family, wasn't it your experience that the primary financing money from banks was not put up until there was available and on hand the pre-production money?

A. That was so. Now, you say "with all my experience." I, unfortunately, had very little experience prior to this with reference to motion picture financing, and my experience came as a result of my conferences first with Mr. Hersh, who educated me along those lines, and then with Mr. Chertok, and then through Mr. Koch, who had some dealings down there with the bank and one of the finance companies in Los Angeles, about which he discussed with me.

Q. I will show you Exhibit H. Exhibit H, Mr. Grupp, is the letter from Producers' Finance Corporation signed by M. P. Koch and directed to Mr. Jack Chertok, in which he is discussing in a preliminary way their negotiations for the lending of money from Producers' Finance to Apex. You will notice by virtue of the terms of that document that no money has yet been advanced to Apex. Under those circumstances, and keeping [189] in mind that date of January 29, 1948, is your memory refreshed as to when money was advanced by Pacific National Bank to Apex?

A. No, this could not refresh my recollection. With reference to that transaction, Mr. Gillard, I tried to explain the bank's position was that they were relying upon Mr. Koch's investigation of this matter and the knowledge of Mr. Chertok and his

(Testimony of Morris M. Grupp.)

background. Before they were even considering the matter, they wanted to know from him primarily what that background was, and they were also inexperienced in the motion picture field.

Q. Would you mind trying to answer my question, Mr. Grupp? A. What is your question?

Q. My question was, does this refresh your recollection as to the date the bank advanced the money to Apex Films? A. No.

Q. Were you the legal counsel for Producers' Finance Corporation? A. Yes, sir.

Q. You were? A. Yes, sir.

Q. And from the date of its incorporation you were acting as legal counsel for Producers Finance Corporation?

A. When I say "legal counsel," I was here in San Francisco; Mr. Fink was in Los Angeles, and he may have acted when Mr. [190] Koch was down there with the same authority that I had here.

Q. I am talking about Producers Finance Corporation. A. Yes.

Q. You were the attorney for that corporation?

A. Yes.

Q. From the date of its incorporation on in connection with these affairs, you acted as counsel for Producers' Finance Corporation? A. Yes.

Mr. Gillard: Thank you, Mr. Grupp.

Mr. Fink: We have no questions.

The Court: Just a moment, Mr. Grupp. I wanted to ask you a question.

Q. In these conferences and advice that you had

(Testimony of Morris M. Grupp.)

during the year 1947 with Mr. Koch and with the persons whom you have mentioned, were you acting in your professional capacity as an attorney for H. Koch & Sons? A. Yes.

Q. Calling your attention to the exhibit in this case, Exhibit C, which is the 1947 income tax return of H. Koch & Sons under the heading of "Expenses, legal and auditing," \$268.00, is that the amount of fee that you charged for your services during that year?

A. I did not charge one cent for services, your Honor, to the Koch family from 1932 until about three years ago—not [191] one cent was ever paid me as attorney's fees by the Koch family.

Q. Then you did not receive any part of that \$268.00 in 1947?

A. It may have been costs, actual costs, or a portion of that may be actual costs I had advanced or that the Koch family paid me for filing fees, for documentation, and so forth, but as far as fees were concerned, there were no fees paid.

Mr. Fink: May I ask a question?

The Court: You may.

Redirect Examination

By Mr. Fink:

Q. How did it happen, Mr. Grupp, that you did not charge a fee for your legal services to the Koch family over those years in which you have described the numerous activities, particularly 1947?

A. I should figure it dates back to 1932, at a

(Testimony of Morris M. Grupp.)

time when I was very young in my practice. The Koch family, Mr. Koch was a very close friend of mine, my family's, and during the years of 1931 and 1932 Mrs. Grupp was quite ill, and during that time, and during a period of some 12 to 15 weeks that she was in the hospital, Mr. Koch advanced—I had on my desk a check every week for the time she was in the hospital for all the doctors', hospital bills, nurses' bills, which amounted to something over \$12,000.00, which was thereafter repaid to him by bank loan. This was all voluntary on his part, and when [192] she got out of the hospital, he presented me with a 1930 Buick automobile, which he took back from one of his salesmen, and after that, very frankly, until long after his death, and until more recently when their plant was flourishing, and upon the insistence of the Kochs, I never rendered a bill for legal services to the family or any member of the family for anything I had done for them. I just could not do it.

Q. You say "after his death." You mean the father?

A. That is correct.

(Witness excused.)

MARTIN EISENBERG

called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

The Court: Will you state your name?

The Witness: My name is Martin Eisenberg.

Direct Examination

By Mr. Fink:

Q. Mr. Eisenberg, where do you live?

A. I live at 510 South Burnside Avenue, Los Angeles, California.

Q. What is your business or occupation?

A. I am a financial and production supervisor in the motion picture industry.

Q. Did you have any training for that particular calling? A. Yes, I do. [193]

Q. What was your training?

A. My training was the coast—costing of—by reason of an accounting background——

Q. You were an accountant at one time, were you? A. Yes, I was.

Q. That was many years ago?

A. Many years ago.

Q. Did you go into cost accounting work?

A. Yes, I did.

Q. In connection with the motion picture business, how long have you been identified with that industry? A. Since the fall of 1932.

Q. Some 24 years ago? A. 24 years ago.

Q. Has all your activity in that business been principally in Hollywood?

(Testimony of Martin Eisenberg.)

A. Principally in Hollywood.

Q. And has it been principally in connection with the production of films?

A. Always the production of motion picture films.

Q. Calling your attention to the year 1946, do you recall the making of a picture called "Copa-cabana"?

A. Yes, sir.

Q. Prior to the actual principal photography of that picture, had you had any relationships with Bank of America? [194]

A. Yes, I had.

Q. What was the nature of that relationship?

A. I had served as controller by appointment and being approved by the Bank of America and other banks to serve in the capacity of controller of the motion picture producing companies.

Q. And have you followed that same type of activity over these years?

A. All during this period.

Q. By the way, you work, I take it, primarily in the so-called independent field?

A. Wholly.

Q. Can you describe for us what we generally refer to as independent productions, how they differ from so-called major studio productions?

A. An independent producing organization is formed by certain individuals for the purpose of producing one or more motion picture features or so-called B pictures for distribution through independent motion picture distribution agencies. That

(Testimony of Martin Eisenberg.)

is distinctive of the distribution as afforded by the major studios' own distribution setups.

Q. In the years 1946 and 1947 were you acquainted with an organization called the United Artists Corporation? A. Yes, I was.

Q. Did you have a constant course of dealings with that [195] organization during that period of time? A. I had, since 1932.

Q. Was United Artists Corporation a so-called distributor for so-called independents?

A. They were wholly.

Q. Did United Artists Corporation make their own pictures? A. No, sir.

Q. They distributed only independent films?

A. Only independent product.

Q. Did you have an acquaintanceship with a Mr. George Backnell? A. Very intimately.

Q. What was his business in 1946?

A. He was vice president in charge of the independent motion picture production on the West Coast.

Q. Were you in touch with him during the year 1946 and the years prior thereto and thereafter?

A. Almost daily.

Q. I will show you here Plaintiffs' Exhibit 5, which I believe is only in for identification up to this point, and ask you if you recognize the signature.

A. The top signature is George Backnell, vice president, and the second signature is Sam Coslow,

(Testimony of Martin Eisenberg.)

who is a producer of Beacon Pictures Corporation, "Copacabana."

Mr. Fink: Your Honor, I may be in error on this. I do [196] not know whether 5 is in evidence or just for identification so far.

The Court: It is only for identification.

Mr. Fink: May I offer it at this time?

Mr. Gillard: I do not think it has any bearing upon any of the issues in this case, if the Court please, a contract executed by parties that are independent to this transaction. For that reason I will object to it.

The Court: Can you show me a connection here, counsel?

Mr. Fink: I thought so, your Honor, but I will continue on with the witness, if I may, to have the record clear in that regard.

Q. Mr. Eisenberg, I will show you Exhibit 5 for identification, which purports to be the agreement between Sam Coslow and United Artists Corporation, and I will ask you if this is not the agreement under which the motion picture "Copacabana" was distributed. A. It is.

Mr. Fink: May we offer it again, your Honor?

The Court: Counsel, what is the connection of that with the parties to this litigation? It has been testified the picture "Copacabana" was made. How does this contract assist in any way in showing these issues?

Mr. Fink: It is part of the over-all picture, to show the contribution of each person toward the

(Testimony of Martin Eisenberg.)

entire pot that makes [197] an independent picture. This man contributed a release, somebody else contributed something else, and I think we might have it all brought to the attention of the Court.

The Court: At the moment I will sustain the objection. I will look at the document, however.

Mr. Fink: Shall I proceed, your Honor?

The Court: Surely.

Q. (By Mr. Fink): Mr. Eisenberg, did the Bank of America make a loan with regard to the picture "Copacabana"? A. Yes, they did.

Q. Do you recall approximately when the first funds from the Bank of America in connection with that loan were made available?

A. The first funds were toward the end of November or the early part of December. I do not recall exactly the week, but it was just one week apart, either the last week of November or the first week of December.

Q. 1946? A. 1946.

Q. Just prior to the release of those Bank of America funds, just prior to the release of that money, did you appear at the studio in connection with this film? A. Yes, I did.

Q. Did you remain there during the production and filming and the cutting of this picture? [198]

A. I did.

Q. Insofar as the relationship with the bank is concerned, the Bank of America, what was the nature of your duties?

A. I was the approved controller by the bank,

(Testimony of Martin Eisenberg.)

to be employed by Beacon Pictures Corporation, to see to it that the moneys contributed by the various money lenders would be properly disbursed in accordance with the provisions of the budget and the contractual obligations on which that budget was based.

Q. Approximately how long prior to the advance of the first bank money was it that you appeared on the scene of this picture?

A. I believe I came in there around November 18, 1946.

Q. Had this picture been in preparation for some time prior to November 18, 1946?

A. I understood that the picture had been in preparation beginning with April of 1946.

Mr. Gillard: I move that the answer go out as being obviously a hearsay statement.

The Witness: No, it was not a hearsay statement, sir. It was knowledge I acquired after I came on the scene and they were all part of the record.

The Court: I will permit it to remain. Let me ask you one question, counsel.

Do you contend that in Exhibit 5, which consists of something over 40 pages, that there is any reference to H. [199] Koch & Sons or to Maurice P. Koch, or to the obligations or duties that they had in connection with this?

Mr. Fink: No, your Honor.

The Court: Then the objection may be sustained.

(Testimony of Martin Eisenberg.)

Mr. Fink: Do you care to hear from counsel on the matter?

The Court: No, I just wanted to know if there was any connection. I looked through it. I could find no such reference, and if there is no such reference the objection may be sustained.

Q. (By Mr. Fink): Were facilities rented for the making of the picture "Copacabana"?

A. They were.

Q. Who were they rented from?

A. Goldwyn Studios.

Q. When you came to the studio after the months of preparation, and just prior to the advancement of the bank loans, did you meet Mr. Koch? A. Yes, I did.

Q. Maurice P. Koch, here in the courtroom?

A. The gentleman sitting right in front of me.

Q. Had you ever met him prior to that time?

A. No, sir.

Q. Did you meet him on the first day of your arrival? A. I did, sir.

Q. Did you see him thereafter? [200]

A. Time and again.

Q. During the course of the production?

A. Pre-production and during the production of the motion picture.

Q. During that period of time did you observe his activities?

A. Yes, I had occasion to observe them.

Q. What were his activities insofar as the picture "Copacabana" are concerned?

(Testimony of Martin Eisenberg.)

A. Well, his activities were in connection with having furnished the pre-production moneys, and guiding through some financial difficulties that had occurred which deferred the original starting date of the production, which had been some time in the early part of November, to the latter part of November, 1946.

Q. I take it difficulties of various types are not unusual in the motion picture business?

A. No, they are not. They are rather common.

Q. Was Mr. Koch at this studio and active in connection with this film for the period of time after you started your activities there?

A. Yes.

Mr. Gillard: I object to that as ambiguous.

The Court: You can ask him whether he was at the studio, and then go into what he was doing, if you want to.

Q. (By Mr. Fink): What did Mr. Koch do from the time he [201] first came there and you met him?

A. During that time and possibly for ten days thereafter Mr. Koch was engaged with the various contributors to the motion picture production in straightening out not alone the financial difficulties but in lending a hand and guiding the production about to be produced, the elements of some of the production activities.

Q. Could you give us an example in that respect?

A. Yes. There was—Mr. Koch, I recall, sug-

(Testimony of Martin Eisenberg.)

gested that there was altogether too many dance numbers to go into the filming or the production filming that might be unnecessary because of the length of the finished picture; that would be overproduction. Then there were questions of wardrobing and many others of that nature which he helped to balance out with the rest of the interested parties in the production activities.

Q. Did these matters that he assisted in have relationship to the over-all cost and expenditures in the picture making?

A. They certainly had, because if they had not acted on his suggestions, the picture would have gone way, way over the budgetary cost.

Q. You say you met him the first day you came there and you saw him for approximately ten days thereafter. Now, after that time was he gone for awhile?

A. Yes, he was. [202]

Q. Did you see him from time to time again after he left?

A. Yes, I did.

Q. Were his activities of a similar nature throughout the filming of that picture?

A. The most difficult part was the time when I first met him after the production started, and they acted on his suggestions, and the production ran more or less smoothly.

Q. Who were the owners of this film "Copacabana"?

A. Well, the owner of the film was the Beacon Pictures Corporation.

(Testimony of Martin Eisenberg.)

Q. Did Mr. Koch have any interest in the filming? A. Yes, he did.

Q. Who were the stars of the film?

A. The stars of the film were Grouch Marx——

Q. May I stop you there? Did Groucho Marx own part of the film? A. Yes, he did.

Mr. Gillard: If your Honor please, I move to strike the last answer so I may make an objection to it, and then I object to the question on the ground it calls for the opinion and conclusion of the witness.

The Court: The answer may go out. Presently I think it does call for his conclusion.

Q. (By Mr. Fink): Do you know whether or not this film was owned by more than one [203] person?

Mr. Gillard: I object to that as calling for an opinion and conclusion of the witness.

The Court: If there is any document which shows the ownership of this film, and there is any question about it, I think the document would be the best evidence.

The Witness: I did——

The Court: Just a moment.

Mr. Fink: Your Honor, we have the document in evidence with regard to the Koch situation, but we certainly do not have the documents with regard to the other people, and I would like to go into somewhat the division of the ownership.

The Court: We are only interested here, counsel, with the activities of H. Koch & Sons, if any.

(Testimony of Martin Eisenberg.)

If you intend to prove any other ownership, I judge you should do it in the legal way, by such documents that there may be, if there are any.

Mr. Fink: Perhaps we can reach it in a different way, your Honor.

Q. Mr. Eisenberg, with how many feature motion pictures have you been associated over your years of experience?

A. Well, about 40 features, about 50 B's, and 330 one-half hour television shows.

Q. Have your activities in the so-called independent motion picture making been continuous throughout the years you have told us about? [204]

A. Yes, they have.

Q. Are you familiar with the term "packaging" in independent films? A. I am.

Q. What does that term generally mean?

A. The packaging is the contribution by the various persons or organizations all brought together for the purpose of producing one or more individual motion pictures.

Q. Are you familiar with the packaging that went to make up the picture "Copacabana"?

A. Yes, I am.

Q. What was that package?

The Court: Was there a written document evidencing that?

The Witness: Yes, there was.

The Court: I take it the written document is the best evidence of what the package was, counsel.

Mr. Fink: No further questions, your Honor.

(Testimony of Martin Eisenberg.)

Cross-Examination

By Mr. Gillard:

Q. Mr. Eisenberg, I am not quite certain by whom you were employed in connection with "Copacabana."

A. There is a custom in the industry——

Q. No, by whom were you employed?

A. I was employed by Beacon Pictures, Inc.

Q. Was it your function to be the controller of the production? [205]

A. It was.

Q. It was your function to examine the budget of the picture and determine that its budget costs were within the amount of money available to be spent?

A. No, that is not the duty of the controller.

Q. What are the duties of the controller?

A. A motion picture controller is one who has the knowledge and experience of the costs of the elements of motion picture production and their administration.

Q. I gather that you testified you were employed as controller on the approval of the Bank of America.

A. That is correct. That is the custom in the industry, because the bank has to have some responsible person upon whom they can depend, that the moneys loaned by the bank and other financial interests contributed by others along with the bank are disbursed properly.

(Testimony of Martin Eisenberg.)

Q. In determining whether or not those funds are disbursed properly, was it not part of your duty to determine that no more funds were expended than were available for the production?

A. That can't always be the case, because sometimes we have difficulties in the course of the production that require additional money to be expended, and that is what they call a picture going over a budget, or costing more than they anticipated it to cost.

Q. Was the budget, as originally set up for "Copacabana," in [206] excess of the amount of money available through the first and second—

A. No, it was less.

Q. It was less. You referred to certain activities on the part of Mr. Koch in making suggestions with reference to eliminating some dance routines, is that correct?

A. Not alone that.

Q. Let us take them one at a time.

A. O.K.

Q. Did he have any authority to cut out those dance routines?

A. No, he as an individual did not have, but by collaboration and discussion, they arrived at the concerted opinion of all those who attended the production meetings, and a lot of his suggestions were followed and saved a lot of money.

Q. I believe you testified his function in being there was as the man who had put up the pre-production money.

A. Yes.

(Testimony of Martin Eisenberg.)

Q. And his purpose in being there was to try to protect his investment so far as he could?

A. That is correct.

Mr. Gillard: That is all.

Redirect Examination

By Mr. Fink:

Q. How many other owners were there of the film "Copacabana"?

Mr. Gillard: I will object to that as calling for the [207] opinion and conclusion of the witness and not being the best evidence.

The Witness: That would not be so, sir, because I do happen——

The Court: Mr. Eisenberg, when an objection is made, the Court will rule as to whether you can answer or not, if you will just wait a moment, please.

The Witness: I beg your pardon.

The Court: Do you expect to pursue that question further, counsel, if he answers it "yes" or "no"?

Mr. Fink: Yes, your Honor. If he answers the question, I expect to pursue it further.

The Court: I will permit the answer as to a number for the purpose of getting that fact. The question is, how many owners were there? I will overrule the objection that far, because there is no question about it. There were some different inter-

(Testimony of Martin Eisenberg.)

ests in it. Answer that. How many owners were there?

The Witness: There were more than six or seven.

Q. (By Mr. Fink): Was Mr. Koch one of those owners?

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness, your Honor.

The Court: I think it does call for an opinion. If there is anything that shows his ownership, counsel, and it is in evidence, then why ask this witness about it? [208] Is it in evidence?

Mr. Fink: Exhibits 16 and 17, your Honor.

The Court: All right.

Mr. Fink: Those are the written documentation on it.

The Court: Why go into it further with this witness?

Mr. Fink: Except certain new phases were opened up on cross-examination.

The Court: Ask your next question.

Q. (By Mr. Fink): Counsel asked you for a conclusion as to under what guise Mr. Koch was acting at the time he was at the studio. Did he act as one of the owners of this film? A. Yes——

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: That is sustained.

Mr. Fink: No further questions, your Honor.

Mr. Gillard: No further questions.

The Court: May I see counsel at the bench?

(Discussion between counsel and the Court at the bench out of the hearing of the reporter.)

The Court: We will take a recess at this time until 1:45, not 2:00 o'clock this afternoon, but [209] 1:45.

Wednesday, November 28, 1956—1:45 P.M.

Mr. Fink: Call Mr. Sebastian.

The Court: There was a witness on the stand, was there not? Had you finished with the witness entirely?

Mr. Fink: I thought we had, your Honor.

Mr. Gillard: Yes.

DAVID A. SEBASTIAN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Fink:

Q. State your name, please.

A. David A. Sebastian.

Q. Mr. Sebastian, where do you live?

A. I live in Beverly Hills, California.

Q. What address?

A. 127 North Swall Drive.

Q. What is your occupation, Mr. Sebastian?

A. I am an assistant producer. I have been a film editor prior to that.

Q. That is in the motion picture industry, is it?

A. Yes.

(Testimony of David A. Sebastian.)

Q. How long have you been connected with the motion picture industry?

A. Approximately 27 years. [210]

Q. Most of your adult life?

A. Most of my adult life.

Q. Prior to your coming into the motion picture business personally, were members of your family connected with that business?

A. Yes, my father was a producer.

Q. Were other relatives in either picture production or exhibition business?

A. Yes, my brother was also a producer and was also in the theatre business.

Q. To what extent?

A. Well, he was manager for the Orpheum Circuit in Los Angeles prior to becoming a producer in the business, and then my brother-in-law was manager of the Keith Alby Circuit west of Denver.

Q. You are related to the Koch family?

A. Yes, I am by marriage.

Q. You know Mr. Maurice Koch?

A. Yes, I do.

Q. Do you also know Harold Koch?

A. Yes, I do.

Q. Do you know William Koch?

A. Yes, I do.

Q. Do you know the sister?

A. Yes, I do. [211]

Q. What is her married name?

A. Mrs. Abel.

Q. Right here in the courtroom?

(Testimony of David A. Sebastian.)

A. Yes, she is.

Q. Have you had transactions relating to the motion picture business with the members of the Koch family whose names you have just mentioned?

A. Yes, I have.

Q. Over what period of time?

A. The past six or seven years, I would judge, more or less.

Q. Well, this is the year 1956. In what year did your associations and affiliations with them in connection with the motion picture matters start?

A. About 1943.

Q. In 1944 did you become a member of Producers' Syndicate? A. Yes, I did.

Q. With the Koch family and others?

A. Yes, with the Koch family.

Q. Calling your attention to matters that ran into the year 1947, I call your attention particularly to the year 1946: Did you know a Mr. David Hersh?

A. Yes, I did.

Q. Is he living now?

A. No, he is dead.

Q. He passed away? [212] A. Yes, he did.

Q. Do you know Mr. Sam Coslow?

A. Yes, I do.

Q. Do you know where he is now?

A. Yes, he is in England.

Q. He is in England? A. Yes, he is.

Q. Do you recall the making of a picture called "Copacabana"? A. Yes, I do.

(Testimony of David A. Sebastian.)

Q. Approximately when was that picture finished?

A. Approximately the first part of 1947 it was completed.

Q. Prior to the making of that film did you have activities in connection with the David Hersh whom we just mentioned?

A. Prior to the "Copacabana" deal?

Q. Yes. A. No.

Q. Was that the first picture that was made after you and Mr. Hersh got together?

A. Yes.

Q. Preceding the making of that film, did you have business dealings with your brother-in-law, Mr. Maurice Koch, in connection with your business with Mr. Hersh?

A. Prior to the making of the picture?

Q. Yes. A. Yes, we did. [213]

Q. What were those initial discussions?

A. The initial discussions were relative to the raising of funds, the moneys for the Beacon Pictures Corporation, in order to go ahead with the making of the "Copacabana" picture. I would like to add to that, if I may. The original meetings we had, Dave Hersh and I, with Mr. Koch were for the purpose of financing independent producers in Hollywood.

Q. Any particular phase of financing discussed?

A. Yes, what we termed front money, or money previous to institutional financing.

Q. Will you please talk slowly, take your time,

(Testimony of David A. Sebastian.)

and talk good and loud? A. All right.

Q. We asked about your early discussions with Mr. Hersh and Mr. Koch in connection with the financing of motion pictures. What were your early discussions about?

A. The early discussions I had with Mr. Koch regarding the financing of motion pictures was Mr. Koch was interested in going into motion picture business, and I was to go in there and act as his agent or in his behalf and in accordance with my own specialty.

Q. Insofar as the discussions that were first had between you, Mr. Hersh, and Mr. Koch, what was the subject of those discussions?

Mr. Gillard: I object to that as calling for the opinion [214] and conclusion of the witness.

The Court: I take it it is preliminary, is it?

Mr. Fink: Yes, your Honor. I asked for the subject of the discussion.

The Witness: The subject of the discussions was the raising of funds and the advancement by H. Koch & Sons for the purpose of financing and putting up front money.

Q. What do you mean by "front money"?

A. That is the money that you use before you have your package together, that is, forming the company and acquiring rights to certain properties, and the necessary expenses that go into the first preparation before you can qualify, have a completed script and qualify for bank financing and secondary moneys.

(Testimony of David A. Sebastian.)

Q. Did you hold such discussions with Mr. Koch in the early part of 1946? A. Yes, I did.

Q. Was there any determination made at that time as to whether or not H. Koch & Sons would participate in the so-called financing of independent producers with so-called front money or preproduction money? A. Yes.

Mr. Gillard: I object to that as calling for an opinion and conclusion.

The Court: It does call for an opinion, counsel. I [215] permitted the other question because I thought it was preliminary and you were going to ask what was said.

Q. (By Mr. Fink): How many such discussions occurred, Mr. Sebastian?

A. We had quite a number of discussions.

Q. Over what period of time?

A. Over the first part of early 1946.

Q. Was this over a period of days, weeks?

A. It was over a period of months.

Q. Will you tell us what was said in those conversations over a period of months?

Mr. Gillard: I object to that.

The Court: Sustained. If you are going into what was said, let us get a conversation, counsel, and do it in the way that the rules require you to do it.

Q. (By Mr. Fink): Do you recall when the earliest of these conversations occurred?

A. I think it was the first month or two of 1946, as I recall it.

(Testimony of David A. Sebastian.)

Q. Who was present at that conversation?

A. Mr. Koch, myself and Mr. Hersh.

Q. Where did the conversation occur?

A. The first conversations we had were in Los Angeles at Mr. Hersh's house.

Q. What was said at that time? [216]

A. The discussion then was to set up the company or set up financing for the purpose of putting up the front money for independent productions.

Q. What did Mr. Koch say H. Koch & Sons would do, if anything?

A. He said they would be willing to put up a certain sum of money for this purpose, and that this fund would then be rotated.

Q. Are you able to distinguish in your mind now what conversation occurred at each one of these meetings?

A. In a general way. It is a pretty long time ago, but in a general way I believe I could.

Q. Do you recall when the second conversation took place?

A. The second conversation, I believe, took place in my office, if I recall rightly.

Q. Who was present at that time, when you say "your office"? A. I mean Mr. Fink's office.

Q. You mean the office of Fink, Ralston, Levinthal and Kent in Hollywood?

A. That is right.

Q. Who was present at that conversation?

A. Mr. Hersh, myself and Mr. Koch.

Q. Was Mr. Fink present?

A. Yes, Mr. Fink was present.

(Testimony of David A. Sebastian.)

Q. What was said at that time?

A. At that time the thought was to go ahead and set up a [217] fund for the making of this first picture, which was to be "Copacabana," and that this fund would then, after the bank loan was made, these moneys would come back and we would go in a second or third venture, using the fund on a rotating basis.

Q. The discussion was, you would rotate these funds, putting them in before the bank loan was made, and getting them repaid out of the bank loan?

A. Correct.

Q. Do you recall when the next conversation occurred?

A. The next conversation we had, if my memory serves me right, was back in San Francisco.

Q. Who was present at that conversation?

A. At that conversation was Mr. Grupp, myself and Mr. Koch.

Q. By the way, did you ever have discussions upon the subject at or about the same time with other members of the partnership, that is, other than Maurice Koch?

A. Yes, I did, prior to the meeting with Morris Grupp. I came up here before that in order to outline the proposed picture from the creative side of it, what we thought the content would be, and what we would have, and I outlined the whole production, what the ingredients of the picture would be, etc.

Q. During the balance of that year, 1946, ap-

(Testimony of David A. Sebastian.)

proximately how much time did you spend with Maurice Koch?

A. The first part of 1946? [218]

Q. Yes. A. In the first part of 1946——

Q. During the entire year, if you can describe it.

A. During the entire year I would say I spent three months in total amount, a short period or a longer time in production.

Q. In the year 1946 that would be three months or 90 days? A. I would estimate that.

Q. During that period of 90 days or three months, adding it all up, what was Maurice Koch doing?

A. Maurice Koch was helping in the preparation of passing on contracts which had to be assembled, passing on the deals being made, seeing that, as represented, the prices of things to be spent were in accordance with the budget, and what was represented to give the merchandise, the picture, under the type of release we had; it had to come in under a realistic figure.

Q. When the "Copacabana" picture was photographed, were you engaged in that work?

A. Yes, I was.

Q. What was the description of the work you did?

A. I would be assistant producer of the picture.

Q. What does the producer do in the picture?

A. The producer handles the creative end of the picture.

(Testimony of David A. Sebastian.)

Q. What did you do?

A. I was the assistant to the producer. [219]

Q. Did you also handle the creative end?

A. Yes, I did.

Q. Did the producer handle any of the financial end of that picture? A. No.

Q. Coming to the year 1947, did you have occasion to see Mr. Maurice Koch in that year?

A. Yes, I did.

Q. Did you also see other members of the Koch partnership? A. Yes, I did.

Q. What was the occasion for your seeing them?

A. I came up here regarding the Jack Chertok deal, which was the "Hill of the Hawk." I brought the books up with me. I received 30 books, and I brought some books up for them to read, so they could all read it.

Q. How much time would you say during the entire year 1947, the year in question here, did you spend with Maurice Koch?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

Mr. Fink: Preliminary.

The Court: Overruled.

(Question read.)

Q. (By Mr. Fink): Can you answer that?

A. Yes, I can. I would say I spent in the year 1947, the first two months, I know—I am pretty certain of that, [220] January and February, up to about the middle of March, as I recall, off and on.

(Testimony of David A. Sebastian.)

because we were still getting ready to release the picture, and then we had previews, etc., and Murray was down there for previews—there was a considerable amount of time put in down there.

Q. You mean Los Angeles?

A. Yes, Los Angeles. We were going out to preview the pictures, and we went out to preview the pictures.

Q. You said “down there.”

A. I mean Los Angeles.

Q. How much time did you spend with Mr. Koch?

A. We spent quite a period of time between January and February, just before March, and then I came up to San Francisco on about March 17th, I believe it was, if I am not mistaken, 1947, and I spent here with them about two weeks, myself and Mr. Koch, in San Francisco.

Q. After the trip here in March of 1947, did you spend any time with Mr. Koch in Los Angeles?

A. Yes, I did.

Q. To what extent?

A. To a considerable extent relative to the deal “Hill of the Hawk” and Apex Films, Jack Chertok.

Q. During the time that you spent with Mr. Koch in the year 1947, did you observe his activities?

A. Yes, I did. [221]

Q. What business was he working in?

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: Sustained.

(Testimony of David A. Sebastian.)

Q. (By Mr. Fink): What was he doing during all the time that you spent with him?

A. During the time he was down here we had meetings with Mr. Chertok, Mr. Mulgras, and Mr. Fink at the Friar's Club.

Q. Mr. Sebastian, you are going to have to give us some help here and take it a little bit more slowly and talk louder if you can. Get closer to the microphone. Were you connected with the matter called the "Fred Fisher Story"? A. Yes, I was.

Q. What did Mr. Koch do in connection with that matter?

A. Mr. Koch met with Mr. Al Green, the former director of "Copacabana." They had discussions regarding the making of "Hill of the Hawk." I mean, there were so many stories—"The Fred Fisher Story."

Q. How many discussions did Mr. Koch and Mr. Green have?

A. The discussions actually started during the filming of "Copacabana" and the completion of it. Mr. Green was busy. They met at the Apex Art Studios, and then Mr. Green's house, and had further discussions. Actually, even prior to that they came to an understanding. If my memory serves me right——

Q. Your understanding would not be proper to testify to. [222] A. All right.

Q. In the year 1947, I take it, the picture "Copacabana" was completed.

A. That is right.

(Testimony of David A. Sebastian.)

Q. Was it shipped off for release, to your knowledge? A. Yes.

Q. And went into release throughout the world?

A. Yes.

Q. Then, also, during the early part of that year you had discussions about the "Fred Fisher Story"? A. That is right.

Q. And the project of that picture. What was the next specific subject of discussion?

A. Insofar as picture making was concerned, picture financing was concerned, we discussed with Mr. Green the idea of actually making a series of pictures over a period of three years, which was our original discussion, and growing out of that was "The Fred Fisher Story," which was the first one we intended to go ahead with.

I would like to correct the first part of my testimony, which was the early part of 1947. I think it was a little confusing for me here.

Q. "The Fred Fisher Story" was to be the first of the series of pictures, is that correct, with Mr. Green? A. That is right, yes. [223]

Q. Subsequent to those discussions, or at the same time, whatever it may have been, did you have discussions about making other so-called Class A feature pictures? A. With Mr. Green?

Q. No, with anyone.

A. Yes, we did. We discussed after——

Mr. Gillard: Just a minute. The witness has answered the question.

(Testimony of David A. Sebastian.)

Q. (By Mr. Fink): The answer was "yes," is that correct? A. Yes.

Q. Do you recall the story "Hill of the Hawk"?

A. Yes, I do.

Q. You just told us about that. Preceding this "Hill of the Hawk" matter, were there discussions or any activities looking towards the making of a film or films? A. Yes, there was.

Mr. Gillard: Just a minute. The witness answered the question.

The Witness: Yes.

Q. (By Mr. Fink): What activity did Mr. Koch or H. Koch & Sons participate in in that respect? A. I met with Mr. Al Green.

Q. Aside from the meetings with Mr. Green and the projected series of pictures with him, were other picture activities taken up during that year by H. Koch & Sons or Mr. Maurice Koch? [224]

A. I remember one, I believe, was Desi Arnaz and Lucille Ball. That was under discussion at the time.

Q. Did that have anything to do with Mr. Green? A. No.

Q. A different project? A. Yes, entirely.

Q. Do you recall any others at or about that same time in 1947?

A. Well, in 1947 we would also have another discussion and some B pictures, which would be made at Monogram.

Q. Did Mr. Koch participate in activities relative to the Monogram pictures?

(Testimony of David A. Sebastian.)

A. Yes, he did. He worked with Mr. Fink on the contracts which were submitted and which he went over. In my presence we discussed——

Mr. Gillard: Just a minute. We object to that. The witness is now giving conversations without the foundation being laid. He has answered the question.

The Court: That is true. Direct your attention to a particular conversation.

Mr. Fink: I had in mind, your Honor, the activities, not the conversations, so we can short-cut the time we are taking of your Honor's time here.

Q. Mr. Sebastian, what was the nature of this Monogram project? [225]

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

Q. (By Mr. Fink): Will you describe what the Monogram project consisted of?

A. The Monogram project consisted of the making of cheap, inexpensive pictures through the release of Monogram, which Mr. Koch was to put up the financing, the front money, and Monogram was to put up the production money.

Q. Insofar as the "Hill of the Hawk" was concerned, did you have discussions on that subject in the year 1947? A. Yes.

Q. Preceding those discussions, what were the activities that led up to that discussion?

Mr. Gillard: I object to that as vague and general.

The Court: It is. Sustained.

(Testimony of David A. Sebastian.)

Q. (By Mr. Fink): With regard to the property "Hill of the Hawk"— A. Yes.

Q. —when did you first have a discussion with Mr. Koch upon the subject of the "Hill of the Hawk"? A. The latter part of 1947.

Q. Who was present?

A. Mr. Fink was present and Mr. Koch—no, I came to San Francisco without first having discussions with him, and having read the book myself, and seeing if he indicated any interest [226] in this project.

Q. Before you had this book, before you discussed the particular title "Hill of the Hawk"—

A. Yes.

Q. —did you have any discussions upon the same or similar subject matter that led up to this?

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

The Court: I will permit that as preliminary. I take it the discussions were with Mr. Koch.

Mr. Gillard: That was not the question.

Mr. Fink: Yes.

The Witness: In the year 1947?

Mr. Fink: Yes. I will withdraw the question.

Q. Do you know Mr. Jack Chertok?

A. Yes, I do.

Q. Did you have occasion to talk with him in the year 1947? A. Yes, sir.

Mr. Gillard: I object to that as incompetent, irrelevant and immaterial.

(Testimony of David A. Sebastian.)

The Court: I will permit him to answer "yes" or "no".

The Witness: Yes.

Q. (By Mr. Fink): Where did this conversation take place?

A. It took place at the Friar's Club, it took place in Mr. Chertok's office, in Mr. Chertok's home. It took place in [227] your office, Mr. Fink. I had many conversations with Mr. Chertok.

Q. Pardon me?

A. We had many conversations with Mr. Chertok.

Q. Was Mr. Koch present at some of these conversations?

A. At the majority of them. In fact, he was at some that I was not.

Q. After you had these discussions with Mr. Chertok, did you have a talk with Mr. Koch, that is, out of the presence of Mr. Chertok?

A. Yes.

Q. Where did this conversation occur?

A. It occurred in Los Angeles and also in San Francisco.

Q. Which one occurred first, Los Angeles or San Francisco?

A. Los Angeles first, and then San Francisco.

Q. Where did the conversation in Los Angeles take place?

A. The conversation in Los Angeles took place in the Friar's Club, I believe, was the first conver-

(Testimony of David A. Sebastian.)

sation we had there. In your office was the first conversation.

Q. Who was present?

A. Mr. Fink was present, Mr. Koch was present, and I was present.

Q. What was said at that time, or approximately when was it?

A. It was approximately the latter part of 1947, as I remember; the last half of 1947, as I recall. [228]

Q. Will you tell us what was said at that time?

A. Yes. If I remember correctly, the discussion there was to set up a company for the purpose of financing, again, motion pictures in Hollywood in an independent way and also to finance Jack Chertok, and I think the instruction would be for Mr. Chertok to go East, if I recall correctly.

Q. Then did you have another conversation on the same subject after the conversation at my office?

A. Yes, we did. We discussed then using the Ambassador Films that was formed in your office for the purpose of buying "Hill of the Hawk."

Q. In the meantime, had you been to San Francisco? A. Yes.

Q. Had you talked with members of the Koch family? A. Yes, I did.

Q. You said something about sending Mr. Chertok East. Was there ever a discussion held with Mr. Chertok about his going East? A. Yes.

Q. When was that?

(Testimony of David A. Sebastian.)

A. That was about the middle half, I believe, of 1947, or shortly after.

Q. Who was present at that conversation?

A. Mr. Koch, Mr. Fink and myself.

Q. Do you recall where it took place? [229]

A. That took place in your office, Mr. Fink's office.

Q. What was said to Mr. Chertok about going East?

A. To acquire the rights of property and for the purpose of making the pictures that we had in mind.

Q. To acquire property rights to make a picture? A. Yes.

Q. Was "Hill of the Hawk" mentioned until that day?

A. It was not mentioned until 1947, as I recall.

Q. Did Mr. Chertok go East? A. Yes.

Q. He returned? A. Yes.

Q. After he returned, was there a conversation held? A. Yes.

Q. Where did that conversation take place, if you remember?

A. As I recall it, the next meeting we had was with Mr. Milt Grosner, Mr. Fink, Mr. Koch and myself at the Friar's Club.

Q. Milt Grosner, do you know him?

A. Very well, yes.

Q. What is his business or occupation?

A. He is head, I believe president or vice presi-

(Testimony of David A. Sebastian.)

dent, of the G. A. C., General Amusement Company of America.

Q. What is this Friar's Club that has been mentioned several times?

A. The Friar's Club is an organization similar to Belasco's. [230] It does charitable work for members of the entertainment field.

Q. People in the entertainment world?

A. Yes, that is right.

Q. What was said at the said Friar's Club with Mr. Grosner, Mr. Chertok, Mr. Koch, Mr. Fink and yourself?

A. At this meeting there was \$7,000.00 paid into the Ambassador Pictures by Mr. Koch and \$18,000.00 paid for the purchase of the book, as I recall it.

Q. What was the total price of the book?

A. \$25,000.00.

Q. Was the book "Hill of the Hawk" mentioned at that time?

A. Yes.

Q. What was said about it?

A. The thought was it would make a very, very fine picture.

Q. Did Mr. Chertok discuss his trip to the East?

A. Mr. Chertok, I believe, had already come back from the East.

Q. After he came back, were you ever present at any conversation in which he made a report of what happened in the East?

A. No, Max, I wasn't present at that meeting. I am sorry.

Q. After this conversation and the \$7,000.00

(Testimony of David A. Sebastian.)

payment, was anything done with regard to "Hill of the Hawk" to your knowledge?

A. Yes, there was. There was a treatment made on the book, as I recall.

Q. Just how was this treatment made? [231]

A. It was made by Mr. Chertok, who hired the writers, paid for by Mr. Koch and his partners, as I understand.

Mr. Gillard: I object to the latter part and ask that it go out as the opinion and conclusion of the witness.

Mr. Fink: It may go out.

The Court: It may go out.

Q. (By Mr. Fink): Mr. Sebastian, what do you mean by "treatment"?

A. We take the book first of all. We had to get a slant on the book, because we couldn't produce the book as it was. We had to get a story line which had a beginning, a middle and an end. In order to do this, we had to eliminate some of the things in there that would not pass censure. For example, there are certain things in there that were not relevant to the true story line.

Q. Approximately how long did this preparation or treatment go on with regard to the "Hill of the Hawk" to your knowledge?

A. To my knowledge it went on approximately eight weeks.

Q. After that treatment was available, do you know whether or not Mr. Maurice Koch saw that treatment?

A. Yes, he did.

(Testimony of David A. Sebastian.)

Q. Was anything further done with regard to a screen play or treatment?

A. On "Hill of the Hawk"?

Q. Yes.

A. I believe due to the difficulties of trying to whip the [232] story and casting problems, there was a difference of opinion on the approach to the story, that Mr. Koch sold out the rights that he had in "Hill of the Hawk" to Mr. Chertok.

Q. That was about two years later, wasn't it?

A. Yes, that was two years later. I mean to say, after that he stepped out, so far as I know.

Q. Do you recall the matter of some training films or discussions on that subject in the year 1947?

A. Yes, I do.

Q. Were you present at some of the discussions on that subject? A. Yes, I was.

Q. Where did these discussions take place?

A. The first discussion we had took place in Mr. Chertok's office, where he outlined the whole program to us, and that was about October or November of 1946, as I remember, when these came under discussion, and Mr. Koch and myself and Mr. Fink went over the whole program of these Army pictures, the contracts, etc., and Mr. Chertok was unable to finance them. That was our reason for being there and Mr. Koch's reason for being there.

Q. After these discussions with regard to the making of training films and the financing of them, were some training films made? A. Yes.

Q. Do you know how many?

(Testimony of David A. Sebastian.)

A. I believe there were about 30 or 40. [233]

Q. Did you work on those films? A. No.

Q. You were not employed in connection with them? A. No.

Q. At times when Mr. Koch was not in Hollywood or Los Angeles, and at times when you were there in the year 1947, did you act for Mr. Koch?

A. Yes.

Q. What did you do for him or for H. Koch & Sons?

A. Primarily what I did for Mr. Koch was to sit through a vast amount of different type of productions in order to find something that was meritorious before I would submit it to him, and he would pass on it, whether he had an interest in that type of product. If he did, he took it on from there.

Mr. Gillard: I object to the latter part of the answer and request that it go out as the opinion and conclusion of the witness.

The Court: I do not know what the latter part of the answer is, counsel.

(Answer read.)

Mr. Gillard: From the point with respect to what Mr. Koch did, I move that that be stricken as the opinion and conclusion of the witness and not responsive to the question.

The Court: I think it may remain.

Q. (By Mr. Fink): So far as your own personal knowledge is [234] concerned, with regard to the year 1947, approximately what part of Mr.

(Testimony of David A. Sebastian.)

Koch's time did he spend in connection with motion picture activities?

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Fink: We have no further questions at this time, your Honor.

Cross-Examination

By Mr. Gillard:

Q. I do not believe you specified, Mr. Sebastian, your exact relationship to Mr. Maurice P. Koch.

A. I am his brother-in-law.

Q. Is your wife alive?

A. No, my wife passed away.

Q. Was that the relationship, that you married one of his sisters?

A. No, he married one of my sisters.

Q. He married one of your sisters?

A. Yes.

Q. In connection with the "Copacabana" affair, who first talked to you about that film?

A. About "Copacabana"?

Q. Yes.

A. It was first brought to my attention by Mr. Hersh, as I recollect. [235]

Q. At that time had Mr. Hersh already made arrangements for a picture based upon the Copacabana Club?

A. Mr. Coslow, I believe, had the release with

(Testimony of David A. Sebastian.)

United Artists for a picture—in fact, for three pictures, as I recall it, and Mr. Hersh with Mr. Coslow had obtained or, rather, through their other associates had obtained the rights, but no rights were actually paid for until Mr. Koch came into the picture. We talked about rights but no rights were actually obtained or paid for.

Q. Prior to that time, Mr. Hersh had formed Beacon Pictures Corporation, had he not?

A. Beacon Pictures Corporation was just a structure. It was not a company. There was no stock issued. It couldn't be issued because there was no money in the corporation.

Q. But the corporation had been formed?

A. Yes, but no permits or licenses for selling stock or distribution of stock had been obtained at that time.

Q. Prior to the discussions with Mr. Koch about "Copacabana," had the corporation been formed?

Mr. Fink: May I object on the ground that the witness would not know when it was formed.

The Court: If he does not, he may say so.

The Witness: I don't know when it was formed. I mean, actually when the Articles of Incorporation were taken out, I don't know. [236]

Q. (By Mr. Gillard): Prior to the time you first talked to Mr. Koch about this affair, didn't Mr. Hersh tell you that he had already formed Beacon Pictures Corporation?

A. They mentioned they had Beacon Pictures Corporation, yes.

(Testimony of David A. Sebastian.)

Q. And thereafter Mr. Hersh was desirous of forming a partnership with you, and that was for the purpose of promoting Beacon Pictures Corporation and the "Copacabana" film?

A. Mr. Hersh was desirous of forming a partnership with me, yes.

Q. And you did so? A. And we did so.

Q. I will show you a document entitled "Articles of Copartnership," dated July 23, 1946, and ask you to look at the last page thereof. Is this a photostatic copy of that? A. Yes.

Q. Would you like to look over that document and see if that is a partnership agreement that you formed with Mr. Hersh at that time?

A. It has my signature on it, so I would assume it is. My signature is here. I recognize David Hersh's signature and mine.

Mr. Gillard: I will offer it in evidence as defendant's next in order. It is a partnership agreement.

The Court: Exhibit J.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit J.) [237]

Q. (By Mr. Gillard): Your first discussions with Mr. Koch were for the purpose of getting some capital for the partnership of Hersh and Sebastian, were they not, Mr. Sebastian? A. No.

Q. Did you receive any money from Mr. Koch in the early part of 1946? A. Yes.

Q. Specifically when and how much?

(Testimony of David A. Sebastian.)

A. I received approximately—you mean all the total funds that went through me?

Q. What was the first amount that you received, Mr. Sebastian?

A. The first amount I received was \$15,000.00, if I remember rightly.

Q. Do you remember when that was?

A. That was in the early part of 1946, some time in 1946.

Q. That was a personal loan to you, was it, Mr. Sebastian?

A. No.

Q. What was it?

A. \$10,000.00 of it was to go to Hersh & Coslow for the money to put into the company—in other words, it was the vehicle in order to assemble and obtain the release, because without the money in there, there was no way of obtaining a release of the picture “Copacabana.” So the money was given to Hersh and Coslow, \$7,500.00, and then there was another \$2,500.00, in addition to the \$5,000.00 which was left of the \$15,000.00, [238] which was to defray the expenses which we entailed in behalf of Murray Koch prior to actual production.

Q. Let us go over this a little more slowly, sir. I will show you Exhibit No. 6. The first amount of money you received was a check made payable to your order and issued by Murray P. Koch, on behalf of H. Koch & Sons?

A. Yes.

Q. Was there any agreement executed with reference to the \$15,000.00 between you and Mr. Koch?

(Testimony of David A. Sebastian.)

A. Not to my knowledge, or I don't remember.

Q. Was there ever anything in writing as to what the purpose of that \$15,000.00 was?

A. No, not to my knowledge, not to my exact knowledge, no.

Q. The money was paid to you to dispose of in accordance with your desires?

A. No, under the direction of Mr. Koch.

Q. Under the direction of Mr. Koch?

A. Yes.

Q. Who was responsible to repay Mr. Koch for that \$15,000.00?

A. May I tell you in my best way?

Q. I just want you to answer that question, Mr. Sebastian.

A. Thank you. The \$10,000.00 went in to activate the corporation.

Q. I asked you who was responsible to repay the \$15,000.00 to Mr. Koch represented by that check. [239]

A. There is a chain of events here, Mr. Gillard. The \$10,000.00 was to be repaid out of the dissolution—when the picture was finished and profits came in, etc., and the corporation was then dissolved. The \$10,000.00 which went in to pay for Hersh and Coslow were to come back to Mr. Koch. The \$7,500.00, which was another \$2,500.00, I believe, that was paid in addition to the \$15,000.00—I notice there is \$7,500.00, but there was another \$2,500.00 paid, I am sure—that went to Hersh and Sebastian to defray the expenses that were entailed in the preproduction work.

(Testimony of David A. Sebastian.)

Q. The other check that you referred to is Exhibit 8 herein, a check made also to your individual favor for \$2,500.00 by Maurice P. Koch on behalf of H. Koch & Sons? A. Yes.

Q. Out of the total of that \$17,500.00, \$7,500.00 was loaned directly to you, was it?

A. No, it was not loaned to me.

Q. It was loaned to Hersh & Sebastian?

A. No.

Q. To whom was it loaned?

A. It was not loaned. It was to defray the expenses which we entailed. We were employed at the time working for Mr. Koch.

Q. You were working for Mr. Koch?

A. We were agents of his, yes, and there were expenses entailed in there that we had been out of pocket for, meetings with him, [240] phone calls, etc., and this was to defray part of the expense.

Q. Who was responsible to pay that money back to Mr. Koch?

A. The \$7,500.00, as I recall—we'll take the \$7,500.00—the \$7,500.00, as I recall it, would have been returned to Mr. Koch out of the profits of the picture. In other words, if I remember, I think Mr. Koch received a pro rata percentage points for the \$7,500.00 which were to come out when the corporation was dissolved, which would come out of the profits of the corporation. But we ourselves were not held responsible for this. In other words, it was to come out of our share of the profits, but there was nothing that I know of in the papers drawn of these amounts being owed him, as I recall.

(Testimony of David A. Sebastian.)

Q. Was there any agreement drawn between you and Mr. Koch indicating you were not personally responsible for this money that was given to you?

A. Not to my knowledge.

Q. In the partnership of Hersh & Sebastian, did you put up any money for the capital of that partnership?

A. For Hersh & Sebastian?

Q. Yes.

A. No, I didn't put up anything.

Q. You put in nothing?

A. No.

Q. I refer you, sir, to paragraph 6 of your partnership agreement, Exhibit 5 in evidence [241] herein.

“Sebastian shall contribute to the partnership as capital cash in the sum of \$75,000.00, which shall be reflected as his contribution to the capital account of the partnership. It is acknowledged that of that said sum the sum of \$10,000.00 has heretofore been contributed to and for partnership purposes by Sebastian, and that said amount has heretofore been delivered to Hersh.”

A. The \$75,000.00 did not go for the partnership, Mr. Gillard.

Q. How about the \$10,000.00, Mr. Sebastian?

A. The \$10,000.00 did not go through the partnership.

Q. What, sir?

A. The \$10,000.00 did not go through the partnership?

Q. It is did not go through the partnership?

A. No, sir.

(Testimony of David A. Sebastian.)

Q. What does this phrase mean?

A. That was, I believe, the original deal we had between Mr. Hersh and myself in order to safeguard these funds, and in talking with Mr. Koch. After that I believe Mr. Koch went direct to the principals themselves and made his own deal apart from us. I had nothing to do with the percentage points Mr. Koch received, or his participation in "Copacabana," or future investments that he made in "Copacabana." The only funds I received was the amount of \$7,500.00, which I received half of it from the Hersh-Sebastian partnership. Other than that, there [242] was no money that went into the Hersh-Sebastian partnership that I know of.

Q. Let me read this again: "It is acknowledged that of the said sum, the sum of \$10,000.00 has heretofore been contributed to and for partnership purposes by Sebastian." That is not true, sir?

A. I imagine it is if it says it there, but I paid the check myself, a personal check from the \$15,000.00 Mr. Koch gave me, which had been deposited in my own bank account, not the partnership bank account, and I made that check payable to Sam Coslow and Hersh.

Q. Isn't it true, Mr. Sebastian, of that \$15,000.00 which is represented by Exhibit 6 in front of you, you contributed of that amount \$10,000.00 to the capital of Hersh & Sebastian as recited in this agreement?

A. Well, I will have to stand on the record, what it says there, Mr. Gillard.

(Testimony of David A. Sebastian.)

Q. Thank you. I will show you, sir, Exhibit 15 in evidence, being a letter signed by you and Mr. Hersh dated August 12, 1946. There again the \$10,000.00 is referred to, is it not, sir? Would you read that middle paragraph, Mr. Sebastian?

A. "The \$10,000.00 originally advanced to Dave Sebastian and subsequently turned over to me for capital investment in Beacon Pictures will be taken care of by the Hersh-Sebastian partnership interest in Beacon Pictures." [243]

Q. Was there anything said in there about the remaining \$7,500.00 that was advanced to you?

A. No, I don't see anything here.

Q. Did you ever reach any agreement with Mr. Koch not to repay him that \$7,500.00 in writing?

A. Not to my knowledge.

Q. Did you ever make any agreement with him not to repay the \$10,000.00?

A. Not to my knowledge.

Q. Prior to the formation of the Hersh-Sebastian partnership, you had been employed in Hollywood, had you? A. Yes.

Q. By whom were you employed?

A. I was with Columbia at the time.

Q. When did you leave Columbia?

A. I left Columbia Pictures in late 1945 or early 1946, I believe, if my memory serves me right.

Q. What was your intended occupation after leaving Columbia?

A. I went on to Beacon Pictures, went into "Copacabana" with Mr. Koch.

(Testimony of David A. Sebastian.)

Q. With Mr. Koch or Mr. Hersh?

A. Well, with Mr. Koch and Mr. Hersh.

Q. Your intended occupation after leaving your salaried position was to engage as an independent producer?

A. No, that is impossible for me to have been an independent [244] producer. First of all, the deals were already set up, and those are the deals I went into. I went in as Mr. Koch's agent, and my specialty has always been where people don't understand the full techniques going into the making of the picture. I am the safety man put in there for the purpose of guiding. I did that many times. I did that with directors from New York. That was my specialty, on the creative side of it.

Q. Wasn't it intended that you be the producer of "Copacabana"? A. Definitely not.

Q. With reference to any other deals besides "Copacabana," what was your intended profession after leaving Columbia Pictures?

A. I only left Columbia Pictures at the time we made "Copacabana." That was the only time that I left, and I couldn't have been producer of "Copacabana" because I didn't have the release. Mr. Coslow did.

Q. I am not referring merely to that one picture, sir. In addition to "Copacabana" you had other plans, did you not? A. Yes, we did.

Q. Wasn't this your idea, Mr. Sebastian, that by virtue of your professional background you would at least be associate producer in pictures?

(Testimony of David A. Sebastian.)

A. I have never been an associate. I have been an assistant to the producer.

Q. You were looking, were you not, for opportunities to become an assistant or a producer? [245]

A. Definitely.

Q. It was your object to scout around and try to find deals on which you could make money as a producer or the associate producer of those pictures?

A. If I could build to that, yes. But you can't do that just for the asking.

Q. For that purpose you had the prospective financial assistance from your brother-in-law to put up the pre-production money for whatever opportunities you found that you saw fit to go into?

A. Mr. Koch selected all the deals we went into. It was not my selection.

Q. Weren't you the one who turned down the "Hill of the Hawk," Mr. Sebastian?

A. I turned down the treatment, not the book.

Q. You turned down the idea?

A. Also, Mr. Koch went on with the deal. I left it completely and Mr. Koch carried it on.

Q. Prior to that time hadn't you advised against going into that as a motion picture production because of the treatment of the book?

A. Prior to the purchase of the book? No, I submitted the book to Mr. Koch.

Q. With the recommendation that——

A. That we go ahead with it.

Q. Pardon me, sir, if I may finish my question.

(Testimony of David A. Sebastian.)

After the [246] story treatment on the book that you have referred to, you recommended to Koch that he not go into that deal, isn't that correct?

A. Upon my return from Europe, and I read the treatment in Europe, yes. After I saw the treatment, I recommended to him that I did not feel that they had followed the story line as we had discussed here, yes, before I left.

Q. And with reference to these other matters that you referred to on your direct examination, you said you had gone through piles of materials looking for good story material for the making of the picture?

A. I have in my home about 500 scripts, Mr. Gillard.

Q. You were looking at this for the purpose, one, of securing vehicles in which you could produce, if Koch would finance, isn't that correct?

A. Not at all, Mr. Gillard.

Q. What was your part to be?

A. I have served many times in any capacity. I was building towards that, yes, but I was serving. It was impossible for me—if I had a million dollars—to go down there as a producer automatically.

Q. What salary was Mr. Koch paying you?

A. Mr. Koch was paying my expenses and providing a job for me in any production we went into. That was my deal with him.

Q. No salary? [247] A. No salary.

Q. Any ventures that you went into, the opportunity was to be yours to make your living in some

(Testimony of David A. Sebastian.)

fashion in connection with the production of that picture?

A. Provided it promoted my career, yes.

Q. Provided he put up the pre-production money, isn't that correct? A. Yes.

Q. You were not an agent of Mr. Koch's, were you? A. Yes, I was.

Q. You were not paid by him?

A. Mr. Koch compensated me by providing for me a job within the production itself. The jobs that I would get would be step-ups, as we planned it, until ultimately I would be producing one day. However, you couldn't start at that point.

Q. What production did Mr. Koch ever own?

A. He owned—he was a big share owner in “Copacabana” and a very important one.

Q. He owned that?

A. He was a big owner of “Copacabana.”

Q. It was owned by Beacon Pictures Corporation, wasn't it?

A. Of which he was one of the major—he held a major interest.

Q. He held some stock in Beacon Pictures Corporation? A. Not to my knowledge. [248]

Q. What other production did Mr. Koch own?

A. Well, of course, might I digress a little?

The Court: Just answer the question.

The Witness: What stage do you mean? Production to us is the purchase of a book, and I am in production. I don't know where you mean. If you

(Testimony of David A. Sebastian.)

mean a completed picture, that is the only one I know of that was completed, yes.

Q. Did you ever repay the \$17,000.00 to Mr. Koch? A. No, sir.

Q. Did he ever ask for it? A. No, sir.

Q. I think you mentioned that this \$10,000.00 that was turned over by you to Mr. Hersh and Coslow, was it?

A. To Hersh and Coslow, yes.

Q. Was that for the purpose of buying stock?

A. For them to buy their stock. Mr. Coslow didn't have the stock. He couldn't get the release. That was the condition of the release.

Q. Was the stock purchased?

A. So far as I know, it was. I mean, I wouldn't know, Mr. Gillard.

Q. You do not know if any stock was issued to Mr. Hersh and Mr. Coslow for that \$10,000.00?

A. I assumed it was. I don't know. I never saw an exchange of stock or stock issued, no. [249]

Q. Did you lend any money or did you or the partnership of Hersh & Sebastian lend any money to Beacon Pictures Corporation?

A. I believe the \$10,000.00, yes, that was given to the corporation by Hersh & Sebastian, so far as I know.

Q. When Beacon Pictures Corporation folded, did you file a claim in bankruptcy for your one-half interest in that \$10,000.00? A. No, I did not.

Q. Did anybody on your behalf file such a claim in bankruptcy? A. No, not to my knowledge.

(Testimony of David A. Sebastian.)

Q. You are positive of that?

A. To my knowledge, Mr. Gillard.

Mr. Gillard: I will offer in evidence a certified copy of the Schedule in Bankruptcy, the referee's claim register, listing the claims filed against Beacon Pictures Corporation.

Mr. Fink: With respect to the apparent purpose for which it is now offered, your Honor, we object on the ground certainly under the law a stockholder or one who is entitled to get money on the dissolution of a corporation by reason of the retirement of stock, certainly has no claim in bankruptcy against the corporation, so whether or not a claim was or was not filed could not possibly make any difference in our case.

The Court: You are offering it for what purpose, Mr. Gillard?

Mr. Gillard: For the purpose of impeaching the witness on his testimony that a claim was not filed. [250]

The Court: It may be introduced for that purpose and marked Exhibit K.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit K.)

Mr. Fink: May I ask, for the record, your Honor, that we may be entirely clear on this matter. It is clear in this record the only question asked of the witness is whether a claim was filed for the \$10,000.00 in stock.

(Testimony of David A. Sebastian.)

The Court: Or for his half of it.

Mr. Gillard: I did not phrase the question that way. That is correct.

Mr. Fink: There is no impeachment in this record, I do not believe, your Honor, based upon the way the questions went in and the answers were given.

Mr. Gillard: I would prefer to have the reporter read it back.

(Record read.)

Mr. Gillard: Will the Court indulge me a second?

Mr. Fink: May I add to my objection, your Honor, that no foundation has been laid for the introduction of the recent document?

Mr. Gillard: That is all for the moment, your Honor.

Mr. Fink: May I have the last exhibit, counsel?

Redirect Examination

By Mr. Fink:

Q. Mr. Sebastian, Beacon Pictures Corporation went into bankruptcy, is that correct?

A. Yes.

Q. At the time they went bankrupt, did they owe you some money? A. Yes.

Q. What for? A. For services rendered.

Q. How much do they still owe you that was unpaid at the time of the bankruptcy?

(Testimony of David A. Sebastian.)

A. I believe it was around \$2,500.00 or \$5,000.00, something like that—\$2,500.00 something.

Q. I will show you here Exhibit K, which counsel has introduced in evidence without showing it to you, and which seems to be the claims register, Beacon Pictures Corporation, Bankruptcy Case No. 47748-WM. It shows here a claim September 15, 1949, the date of filing. Claim No. 5: David Sebastian, 616 North Bedford, Beverly Hills, \$5,000.00.

A. That is for salary owed me.

Q. Speak up, Mr. Sebastian.

A. That was a deferment which I gave during the course of the picture. My salary was \$7,500.00. \$2,500 of that I drew and \$5,000.00 of that I deferred.

Q. Did they owe you that when they went broke?

A. Yes.

Q. By the way, you hold some other claim in this bankruptcy. Carmen Miranda was your wife, is that correct? [252]

A. That is correct, yes.

Q. You were married to her after the picture "Copacabana" was made?

A. Yes.

Q. There is a claim also in this bankruptcy that you are administering in connection with this same picture?

A. Yes.

Q. So far as Beacon Pictures Corporation is concerned, after it went bankrupt, did you ever get back the \$17,500.00 from Beacon?

A. No.

Q. Or any part of that \$17,500.00?

A. No.

Q. Did you ever transmit money for H. Koch & Sons?

A. Yes.

(Testimony of David A. Sebastian.)

Q. I note that certain of the checks in evidence here for \$30,000.00, \$50,000.00 and other amounts were made payable to you. When you got those moneys, what did you do with them?

A. In some cases they were deposited to the partnership. In other cases they were given directly to Beacon Pictures.

Q. When it came to giving these notes, Exhibits 12 and 14, first for \$50,000.00 and the second for \$30,000.00, I notice they are made out to the order of Murray P. Koch. A. Yes.

Q. Did you ever get any notes from Beacon Pictures Corporation? [253] A. No.

Q. I noticed that you mentioned your activities, I believe you termed them, were on the artistic or creative side. A. Yes.

Q. Insofar as determining what part of the particular picture Mr. Koch was going to own or not own, or H. Koch & Sons was going to own, did you negotiate those percentages or amounts?

A. No.

Mr. Fink: No further questions.

Mr. Gillard: Just one further question.

Mr. Fink: I think I should as a matter of record, your Honor, move to strike Exhibit K. I do not think it has any impeachment value. If it had been shown to the witness, and he had had a chance to explain, I do not think it would have been offered in the first place.

The Court: The objection may go to the weight of the testimony or the exhibit. It may remain in evidence.

(Testimony of David A. Sebastian.)

Recross-Examination

By Mr. Gillard:

Q. Mr. Sebastian, the latter two checks that were referred to by Mr. Fink, the one for \$50,000.00 and the one for \$30,000.00, were received by you with specific instructions, were they not, from Mr. Koch for transmittal to Beacon Pictures Corporation?

A. For transmission to Beacon Pictures Corporation, correct, yes. [254]

Q. For the purpose of consummating a loan between that corporation and Mr. Koch directly, isn't that true? A. And the Koch people, yes.

Q. As a matter of fact, before you deposited that check to your bank account, that \$50,000 check to your bank account, you had written to him and told him you were going to do so and asked for permission to do it in that fashion, so that the money could be held until the transaction was completed with Beacon Pictures Corporation, is that so?

A. If the record shows that. I don't recall writing the letter, no. If the record shows that.

Mr. Gillard: The letter is in evidence. I can't put my finger on it right now. Thank you.

Further Redirect Examination

By Mr. Fink:

Q. Mr. Sebastian, so we may have our play on words here clarified, what did Mr. Koch or H. Koch & Sons get for all this money as far as the picture

(Testimony of David A. Sebastian.)

“Copacabana” is concerned? Did they get just a loan or was there something more than that?

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness. The document is the best evidence.

The Court: Sustained.

Mr. Fink: I suppose I am a little late in making the objections, your Honor, but I would like to have the last questions that were asked of the witness objected to and the answer stricken for the purpose of the objection, due to the fact that they also call for the conclusion of the witness, and since we cannot clarify it, perhaps the record should be [255] clarified in that regard.

The Court: The answers may stand. They came in without objection.

Mr. Fink: We have no further questions.

Mr. Gillard: That is all.

The Court: We will take a recess now.

(Recess.)

REBECCA KOCH ABEL

called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Fink:

Q. Mrs. Abel, you are the sister of Mr. Maurice Koch?
A. Yes.

Q. And of Harold and William Koch?

(Testimony of Rebecca Koch Abel.)

A. That is right.

Q. And you are a partner in H. Koch & Sons?

A. Correct.

Q. This partnership started, I take it, in 1941?

A. The beginning of 1942.

Q. We have here in evidence as Exhibit 1 the partnership agreement, which is dated December 31, 1941.

A. That is right.

Q. You started in business in 1942?

A. January 1st, 1942. [256]

Q. Your partnership agreement was amended on or about the 23rd day of October, 1944?

A. That is right.

Q. Since this business was inaugurated beginning with the year 1942, who was the general manager of H. Koch & Sons?

A. Murray Koch.

Q. Murray, also known as Maurice?

A. Known as Maurice P. Koch, yes.

Q. Were you active in this business?

A. Yes, I was.

Q. What were your duties?

A. The office work and their books.

Q. And your other two brothers, what did they do?

A. William Koch and Harold Koch took care of the plant management and the general running of the plant.

Q. I am afraid we are having trouble hearing you, Mrs. Abel. Will you speak slowly and as loud as you can?

A. Thank you.

Q. You say that Harold and William Koch took

(Testimony of Rebecca Koch Abel.)

care of the plant? A. That is right.

Q. I take it your business in 1946 was somewhat smaller than it is now? A. Quite a bit.

Q. In 1946 and 1947 where was H. Koch & Sons' principal office located? [257]

A. 73 Beale Street, San Francisco.

Q. Did you occupy space in that building?

A. Yes, we did.

Q. What floor were you on?

A. We had the three floors, I believe—1946 and 1947 you said, did you not?

Q. Yes.

A. Yes, we had the three floors. I can't remember whether we had the ground floor at that time or not.

Q. At that time the business, going back to 1942 and 1943, your business was the manufacturing of luggage? A. That is right.

Q. Did you also buy and sell luggage from other people? A. Yes, we did.

Q. At the present time do you still make the same kind of luggage?

A. No, we do not. We are making fiberglass luggage today, which is entirely different.

Q. In other words, following the last several years you have been more or less in the fiberglass business? A. That is right.

Q. And your business, I take it, now is larger than it was in the days of 1946 and 1947?

A. That is correct.

Q. Did your business, since you told us you were

(Testimony of Rebecca Koch Abel.)

in charge of [258] the books and records in the office in 1946 and 1947, did you keep regular business records? A. Yes, we did.

Q. Did you supervise those books yourself?

A. Yes.

Q. Did you keep books and records of your business transactions? A. Yes, we did.

Q. Were you in the years 1946 and 1947, in addition to the luggage business activities, also engaged in the motion picture financing business?

A. Yes, we were.

Q. Did you keep records of your transactions in connection with motion pictures?

A. Yes, we did.

Q. Were you the bookkeeper all during the year 1946? A. Yes, the year 1946.

Q. In 1947 did you leave the business?

A. Yes, I did. I left in about March or April, 1947.

Q. Were you married at that time?

A. I went to South Africa.

Q. Did you continue to be a partner?

A. Yes, I did.

Q. And then you returned to this country?

A. Yes, in 1954, in March. [259]

Q. Did you resume the supervision of the bookkeeping since that time? A. Yes, I did.

Q. Do you know, at least up to the time that you left, the books and records of H. Koch & Sons?

A. Yes.

Q. Since this matter has come up have you for

(Testimony of Rebecca Koch Abel.)

counsel and for us looked up the old books and records? A. Yes, I have.

Q. Do you have them here in the courtroom?

A. Yes, I have.

Q. Will you turn to Account No. 40, please? Do you need both of these? A. No, I do not.

Q. You have handed me here the ledger page Account No. 40. It is headed "Investment," is that correct? A. That is correct.

Mr. Fink: Counsel, you have a copy of this page, have you not?

Mr. Gillard: I believe I have a photostatic copy of it.

Q. (By Mr. Fink): The first item on this page appears to be May 31st, and let me ask you this: On this particular page is it customary to make the entries only at the end of the month?

A. Yes, it is.

Q. In other words, transactions prior to this page are added [260] up at the end of the month?

A. Yes.

Q. I notice each entry here seems to be for the end of the month. A. Yes.

Q. On May 31, 1946, the end of that month, we see "CR 259 \$17,500."

A. Yes, that represents a check issued. I say that represents a check issued.

A Juror: If the lady would talk into the microphone——

Q. (By Mr. Fink): The \$17,500 represents what? A. A check issued.

(Testimony of Rebecca Koch Abel.)

Q. The "CR" represents——

A. Check 259.

Q. "CK," what does that refer to?

A. That is the check record 259.

Q. Do you have the check record here?

A. Yes, I do. There it is, \$17,500.

The Court: Please. You are either speaking for the record or not.

The Witness: That \$17,500 represents a check issued on May 17th to D. Sebastian for \$15,000, and the other check here is issued on the 22nd for \$2,500 to D. Sebastian.

Q. (By Mr. Fink): And the \$15,000 check and the \$2,500 check total the sum of \$17,500, is that correct? [261] A. That is correct.

Q. That was entered at the end of the month on this page? A. Check 259, that is correct.

Q. Are there any matters on this page, Account 40, that do not pertain to the picture business?

A. Yes, there are.

Q. Will you tell us what they are?

A. There is one item down here, \$66,000, which was the land that we purchased over in Corte Madera.

Q. Was that your factory land?

A. That was our factory land, yes, and the real estate tax on it for \$287.00 is there as well.

Q. You have your factory property where your factory is located now? A. That is correct.

Q. And the taxes on that land in the year——

A. 1953.

(Testimony of Rebecca Koch Abel.)

Q. 1953, and aside from that everything else on that page relates to motion pictures?

A. That is correct.

Q. We see here an item of \$50,000 put down here at the end of the month of August, 1946.

A. That is from check record 270, and it is issued on the 5th of August, payable to D. Sebastian for \$50,000.

Q. The next one is \$30,000, which is entered in the month of [262] October as far as Account 40 is concerned?

A. Then there is a check issued on the 17th of October—pardon me—on the 16th of October to D. Sebastian for \$30,000.

Q. And we have on November 30th, 1946, an entry here of \$20,000 at the end of that month.

A. That was a check that was issued on the 22nd and made payable to Beacon Pictures.

Q. These checks that you told us about so far are all from H. Koch & Sons, a copartnership?

A. That is correct.

Q. The next entry seems to be—now, that last item of \$20,000, I see an item of \$20,000 on December 31st as a credit. What does that indicate?

A. That was money received on the 31st of December. That is in the cash record. That was a check of \$20,000 returned from Beacon Pictures.

Q. Beacon Pictures paid you back \$20,000?

A. That is correct.

Q. That was December—

A. December 6th.

(Testimony of Rebecca Koch Abel.)

Q. December 6, 1946? A. Correct.

Mr. Fink: Your Honor, I should like to offer in evidence page 40 taken from the ledger, and I should like to ask leave of Court to substitute a photostatic copy of this page in order [263] that the books may be returned intact.

Mr. Gillard: So far, if the Court please, the testimony that has been elicited from this witness and the record of the investment account that she has read off merely duplicates the checks that have been put in evidence and the testimony of Mr. Koch. I do not know that this adds anything.

The Court: The photostatic copy may be admitted in evidence and marked Exhibit 37.

Mr. Gillard: May I pass up a photostatic copy to the Court for a minute? The evidence was that there were transactions on there which did not pertain to the motion picture business, and also there are transactions on there in 1948 which were excluded from the testimony at a prior time. I would assume that the record of this investment account 40 should be put in evidence limited to time.

Mr. Fink: At counsel's request I will be glad to withdraw the exhibit, if I may do so, since we apparently do have our checks in evidence and testimony in regard to these transactions already in the record.

The Court: Then you do not desire the exhibit introduced?

Mr. Fink: I think I would just as soon withdraw it and not encumber the record further.

(Testimony of Rebecca Koch Abel.)

The Court: The order admitting it may be set aside.

Q. (By Mr. Fink): I would like to have you take a look at Account No. 2, the year 1947. [264]

A. Account No. 2. I have the photostatic copy only.

Q. What was the cash position of H. Koch & Sons at the end of the year 1947?

A. At the end of 1947 we show overdraft, Pacific National Bank, of \$14.14.

Q. Did you have any other bank accounts?

A. No, we did not.

Q. That was your only bank account?

A. Yes.

Q. At that time how much money did you have invested in the picture business?

A. At the end of 1947 we had \$75,000.

Q. At the end of the month of October, 1947, what was the cash position of H. Koch & Sons?

A. October, 1947?

Q. October 31st.

A. We have an overdraft of \$808.01.

Q. At that time how much did you have invested in the picture business?

A. \$82,500.

Mr. Fink: That is all.

(Testimony of Rebecca Koch Abel.)

Cross-Examination

By Mr. Gillard:

Q. Mrs. Abel, you have given us certain figures with reference to the investment of H. Koch & Sons in the motion picture business, and excluding the item of \$20,000, [265] which was paid out in November and repaid in December, those two items cancelled each other, is that correct?

A. That is correct.

Q. The balance of the total investment shown by this account then was \$97,500?

A. That is correct.

Q. The balance of the total investment paid out?

A. At what period?

Q. I am just now taking the investment side of the ledger, Mrs. Abel.

A. \$97,500. You are correct.

Q. That is correct. You later testified from, I think you said, Account No. 2 that the investment at the end of 1947 was \$75,000 and at the end of October, 1947, the investment was \$82,500.

The Court: I think your dates are incorrect, Mr. Gillard. I do not think you mean at the end of 1947 they were \$75,000.

Mr. Gillard: Maybe I misunderstood the witness.

Q. What was your testimony as to the amount shown in Account No. 2 as the investment of H. Koch & Sons as of December 31, 1947?

(Testimony of Rebecca Koch Abel.)

Mr. Fink: Counsel, No. 2 is the bank account. Do you want a copy of it?

Mr. Gillard: You are testifying from some other record.

Mr. Fink: Account No. 40 is the investment account. [266]

Mr. Gillard: You gave a figure as to the investment of H. Koch & Sons as of the end of 1947.

The Witness: No, 1946.

The Court: You gave another figure at another time, October, 1947.

The Witness: That is correct. October, 1946, I believe it was.

The Court: You gave a figure of \$82,500.

The Witness: That was as of October 31, 1946.

Q. (By Mr. Gillard): Did you give a figure of \$75,000? A. Yes, I did.

Q. For what was that?

A. That was at the end of October, 1946.

The Court: I don't understand. You just said that at the end of October, 1946, it was \$82,000. Now you say \$75,000.

A. October it was \$82,000. December 31st it was \$75,000.

Q. You said October both times.

A. I am sorry.

Q. (By Mr. Gillard): In other words, it is your testimony that the records show that during the year 1946 a decrease in the total original investment of \$97,500 took place, is that correct?

(Testimony of Rebecca Koch Abel.)

A. I didn't quite follow the question.

Q. Your testimony shows a decrease in the total amount invested during the year 1946.

The Court: Decrease from what, counsel? [267]

Mr. Gillard: Decrease from \$97,500.

The Witness: To \$75,000 correct.

Q. (By Mr. Gillard): The decreases are shown by the entries in the credit account on investment account No. 40, is that correct?

A. That is correct.

Q. Investment account No. 40 is not what you call an original account, is it, Mrs. Abel?

A. Just what do you mean by an original account?

Q. It is an account which is taken from other accounts, which are the original accounts.

A. The postings in the Account No. 40, investments, are drawn from the general journals of the books.

Q. And those would be considered the original accounts?

A. The original entry. This is the control book.

Q. The first decrease in the investment of H. Koch & Sons which is shown on investment account No. 40 was made with an entry on June 30, 1946, in the amount of \$5,000, is that correct?

A. That is correct.

Q. That was taken from your cash receipts record on page 102? A. That is correct.

Q. Will you turn to cash receipts record, page 102, and tell me where that \$5,000 came from?

(Testimony of Rebecca Koch Abel.)

A. That consist of two checks, one check for \$2,500 on the 18th of June from F. Farilla and one from R. Haller for \$2,500. [268]

Q. The next item on your investment account 40 as of August 31st shows a credit to the account of \$2,500. That came from your accounts receipts register, page 107. Where did that money come from?

A. That was the cash receipts on the 22nd of August from Roy Haller.

Q. The next item on the investment account, \$7,500, posted as of October 31, 1946, in the amount of \$7,500, that came from cash receipts record, page 112, where did that money come from?

A. That was a check on the 8th of October from F. Farilla.

Q. For \$7,500? A. \$7,500.

Q. And the last entry, disregarding the canceling \$20,000 entries, is an entry on December 31, 1946, for \$7,500, and that came from cash receipts at page 117, will you tell us what that entry is for?

A. That is on the 27th of December. There is a check for \$2,500 from Roy Haller, one for \$5,000 from F. Farilla.

Mr. Gillard: Thank you.

Redirect Examination

By Mr. Fink:

Q. Mrs. Abel, in addition to the money of H. Koch & Sons that was used in this picture business, did you likewise use money borrowed or obtained from other people? A. Yes, we did.

(Testimony of Rebecca Koch Abel.)

Q. Some of this money was obtained from a man named F. Farilla. [269] Was that Frank Farilla?

A. That was obtained by Maurice Koch, yes.

Mr. Gillard: I am going to ask that the answer go out to allow me to make an objection. The witness obviously is not testifying from her own knowledge on that.

The Court: The motion may be denied. It came in without objection.

Q. (By Mr. Fink): Then some additional money that shows as having come from—what was the other name? A. Roy Haller.

Q. Roy Haller. Do you know of your own knowledge whether or not H. Koch & Sons were seeking funds from other people to assist in this business of motion picture financing? A. Yes, we did.

Q. Pardon me? A. Yes, we did.

Q. In any event, so far as your books reflect, did you ever get back \$80,000 from a picture called the "Copacabana"? A. No, we did not.

Q. The suit here in question has to do with a loss incurred in 1947 by the partnership in the sum of \$75,000. A. That is correct.

Q. However, the notes which we have in evidence here indicate the sum of \$80,000 was advanced in connection with the picture "Copacabana." Can you tell us what this \$5,000 differential is? [270]

Mr. Gillard: I object to that as calling for the opinion and conclusion of the witness.

The Court: Overruled.

(Testimony of Rebecca Koch Abel.)

Mr. Fink: Insofar as your records are concerned. May I reframe the question?

The Court: Do you understand the question?

The Witness: No.

Q. (By Mr. Fink): How much money did you get from Roy Haller altogether?

A. \$5,000—yes, \$5,000.

Q. \$5,000? A. I believe so.

Q. I see by your records here in connection with this "Copacabana" \$17,500—

A. I am sorry, there is another \$2,500 in here.

Q. Did he get part of that back? A. No.

Q. That was his money, is that correct?

A. That is correct.

Q. You never treated that as partnership funds, Mr. Haller's money? A. No, we did not.

Q. So we have no concern about that here.

A. That is correct.

Q. You received approximately, I think, in accordance with [271] figures counsel mentioned, around \$15,000 from Frank Farilla, is that correct?

A. That is correct.

Q. Were there any changes made with regard to that money after it was noted as Frank Farilla?

A. Yes, sir.

Mr. Gillard: I object to that as incomprehensible.

The Court: Do you mean changes on the books?

The Witness: Yes.

The Court: You may answer.

The Witness: Yes, there were.

(Testimony of Rebecca Koch Abel.)

Q. (By Mr. Fink): What changes were made?

A. They were transferred to the credit of Maurice P. Koch, because the checks originally came in in the name issued by Farilla, and that is the way they were entered in the cash receipts book, while they were actually monies borrowed by Maurice P. Koch and contributed to the fund.

Q. That was the \$15,000?

A. That was the \$15,000.

Q. Did that constitute any part of the \$75,000 loss that the partnership took? A. No.

Q. In other words, Mr. Koch's \$15,000 that he borrowed was treated entirely separate?

A. That is correct. [272]

Mr. Fink: That is all.

Recross-Examination

By Mr. Gillard:

Q. When you say that changes were made, Mrs. Abel, you mean that investment account No. 40 originally corresponded with the original books of entry and showed various items that we have discussed referring to Mr. Frank Farilla, that they were originally entered on Account No. 40 as Frank Farilla, is that correct? A. That is correct.

Q. Then the name Frank Farilla was erased from Account 40?

A. Yes, it is a pencil notation just to break down the account.

Q. In the place of Frank Farilla was the name

(Testimony of Rebecca Koch Abel.)

of Maurice P. Koch? A. Yes.

Q. Who did that? A. I did that.

Q. At whose instructions did you do that?

A. On reviewing the account, when checking the records we found this was Mr. Koch's personal investment and not monies due to Farilla.

Q. Where in the records did you find that that was Mr. Koch's money and not Mr. Farilla's?

A. In general discussions, while going through this account.

Q. In other words, it did not appear in the accounts, is that [273] correct?

A. No, it does not appear in the accounts, because the check is entered in the cash receipts under the issuer of the check.

Q. When you just answered me and said in reviewing the accounts you found the error, that was incorrect?

A. We were reviewing the investment account, yes.

Q. There is nothing in the original books of entry show any contribution by Maurice P. Koch individually, is there?

A. No, other than the check from Frank Farilla.

Q. I will repeat the question. There is nothing in the original books of account that show any investment by Maurice P. Koch individually?

A. No.

Q. At whose direction did you erase the words "Frank Farilla" on Account No. 40 in three places and insert the initials "MPK"?

(Testimony of Rebecca Koch Abel.)

A. Well, I couldn't exactly say under whose instructions. I was checking the account to find what constituted this account, and in the breakdown I realized this was not Mr. Farilla's investment, that we were not liable to Mr. Farilla for that amount of money.

Q. You have made the original entries yourself in the cash receipts? A. Yes, I did.

Q. What was there in your review of those entries which indicated that you did not owe that \$15,000 to Frank Farilla? [274]

A. The mere fact that I posted it to the investment account. It would not be in that investment account if we owed that money to Frank Farilla.

Q. Would that be true with reference to Mr. Haller?

A. No, we did not owe that money to Mr. Haller either. That was money that we got——

Q. The checks that were received from Mr. Haller and entered in the cash receipts book were carried under his name in the investment account, were they not? A. Yes, they were.

Q. Why from the accounts themselves did you determine the name Farilla should not be on the investment account as well as on the cash receipts ledger?

Mr. Fink: To which we object at this point on the ground it is purely argumentative.

The Court: She may answer. She made the entry.

A. No, I mean knowing what we owed, if we had

(Testimony of Rebecca Koch Abel.)

owed this amount of money to Mr. Farilla for some time, he would have been hounding us for it, and since he had not, it required investigation.

Q. (By Mr. Gillard): This investment account is not a debt, is it? A. No, it is not a debt.

Q. The fact that his name was on the investment account did not indicate you owed him anything? [275] A. No.

Q. That was not the reason you took Mr. Farilla's name off the investment account No. 40, was it? A. No.

Q. At whose direction did you erase the name, Frank Farilla, and insert the initials "MPK"?

A. We were discussing it. We were going through this and we were told it was Mr. Koch's account.

Q. Who told you that?

A. The partners, when we were discussing this here.

Q. Who in particular?

A. No one. It was in general discussion. I couldn't say exactly who.

Q. Did someone else besides Maurice P. Koch give you that information?

A. There were several of us in the room. I couldn't tell you exactly which one said it.

Q. In other words, the partners had a meeting and agreed that the name Frank Farilla should be erased from the investment account and the initials "MPK," referring to Mr. Koch, should be inserted in place thereof, is that correct?

(Testimony of Rebecca Koch Abel.)

A. They agreed it was Mr. Koch's money coming in and not Mr. Farilla's.

Mr. Gillard: Thank you.

Mr. Fink: Thank you. May we recall Mr. Koch for just a [276] moment.

MAURICE P. KOCH

recalled as a witness on behalf of the Plaintiffs, having previously duly sworn, testified as follows:

Further Redirect Examination

By Mr. Fink:

Q. Mr. Koch, in connection with money used in this picture business, did you have a \$15,000 transaction, or a transaction totaling \$15,000 with Mr. Frank Farilla? A. I did.

Q. What kind of transaction was that?

A. I borrowed \$15,000 from Mr. Farilla to put in this picture deal.

Q. Did you ever repay the money?

A. Yes, sir.

Q. How?

A. I was in business with Mr. Farilla.

Q. You told us that the other day. How did you repay the money to him?

A. When we dissolved the partnership, I accepted that \$15,000 as part of my payment of the business on dissolving the partnership.

Q. In other words, cleaning up your partnership arrangements with Mr. Farilla you accounted for this \$15,000 back to him.

(Testimony of Maurice P. Koch)

A. That is correct, yes, sir.

Q. That is why you cleaned it up? [277]

A. That is correct.

Q. \$15,000 that appears to have been deposited along with the other picture funds, did that come first to Mr. Farilla by way of check?

A. Mr. Farilla gave me the checks and I think there were about two or three checks, and they were turned over—they were endorsed and turned over to the firm, and that is how the name of Farilla got into our books.

Q. When you discovered that later were the books changed? A. Why, certainly.

Q. By the way, the \$15,000 that you are now talking about, was that used for the picture business purposes in 1947?

A. That \$15,000—we were hard pressed for money. The firm of H. Koch & Sons were hard pressed for money. We had a lot of money in the picture business there, and the loan that I obtained from F. Farilla & Sons reduced the loan that we had given Beacon Pictures Corporation by \$15,000, and the firm used that money. That is why our investment was reduced to \$75,000 instead of \$90,000, by me borrowing \$15,000 from Farilla.

Q. Then that \$15,000, you lost that yourself?

A. That is true.

Mr. Fink: That is all.

(Testimony of Maurice P. Koch)

Cross-Examination

By Mr. Gillard:

Q. The original monies that you paid out in this case, the first monies that you paid out, you [278] have testified to—these two checks which total \$17,500—were advanced in the month of May, 1946, is that correct?

A. The first checks that were paid out were \$17,500. I do not remember the exact date. You have the record there, sir.

Q. Exhibit 6 for \$15,000 on April 25th.

A. That is what it says.

Q. Exhibit 8 for \$2,500 on May 22nd.

A. That is what it says there, yes.

Q. The first check that you got from Mr. Frank Farilla was in the month of June, 1946, for \$2,500, is that correct? A. Yes, sir.

Q. At that time had you asked him for \$15,000?

A. Yes, sir.

Q. You had asked him for 15,000 at that time?

A. Yes, sir.

Q. He did not have it?

A. That is right, sir.

Q. So \$15,000 was not borrowed in June, 1956, was it, Mr. Koch?

A. The \$15,000 that I asked him for was going to be given to me in various checks.

Q. So that by June, 1946, you had borrowed from Mr. Frank Farilla, according to your testimony, \$2,500.

(Testimony of Maurice P. Koch)

A. Whatever the record shows there.

Q. That is because you needed the money in the business, you were short of cash, is that [279] correct?

A. That is correct.

Q. The next time you borrowed some money from Mr. Frank Farilla was \$7,500 in the month of October, is that correct?

A. That is part of the \$15,000.

Q. You borrowed \$17,500 from him in October, 1946?

A. Whatever the record shows, yes, sir.

Q. At that time the business was likewise very short of cash, is that correct? I believe your sister testified at the end of October there was an overdraft of \$14.00 in the bank, is that correct?

A. That is what the record shows, yes, sir.

Q. In December, 1946, you borrowed an additional \$5,000 from Mr. Frank Farilla?

A. That was the balance of \$15,000, yes, sir.

Q. In December, 1946, you likewise had an overdraft in the bank, is that correct?

A. That is right, sir.

Q. The final check that was sent to Beacon Pictures Corporation, the \$30,000 check, was in the month of October, 1946?

A. That is right.

Q. Mr. Koch, who instructed that any of your borrowings from Frank Farilla be entered in the investment account No. 40?

A. Originally I did not instruct—I put the money into the firm, I loaned the money, I borrowed the money from Frank [280] Farilla to put

(Testimony of Maurice P. Koch)

in this picture. It was put through the books, and I am not too familiar with the books. I am not familiar how the transaction got in there. I didn't instruct anybody to put it in 40.

Q. It was a borrowing of money from Frank Farilla, was it not?

A. I borrowed the money personally from Frank Farilla.

Q. Personally? A. That is right.

Q. It was not a borrowing of H. Koch & Sons?

A. That is correct.

Q. Who instructed that the transaction be entered in the partnership books of H. Koch & Sons?

A. I deposited the money into H. Koch & Sons.

Q. The Frank Farilla check?

A. Yes.

Q. And that was a debt owed to Mr. Frank Farilla? A. Yes.

Q. Each one of those checks is debt owed to Frank Farilla?

A. I owed it to him personally, not the business.

Mr. Gillard: Thank you, sir. That is all.

Mr. Fink: We have no further questions. The plaintiff will rest, Your Honor.

Mr. Morgenstein: At this time, Your Honor, the defendant would like to make certain motions.

The Court: Does the defendant rest? [281]

Mr. Morgenstein: May we approach the bench?

The Court: I would like to know if the defendant rests.

Mr. Morgenstein: We would like to make our

motion prior to the submission of the case. We would like to submit certain motions to the Court out of the presence of the jury at the conclusion of the plaintiffs' case.

The Court: We are about to take a recess at this time.

(Thereupon the jurors were excused, and in their absence the following occurred:)

Mr. Morgenstein: If the Court please, the defendant would like to move to dismiss and also for a directed verdict pursuant to Rule 50. Our motion to dismiss is based upon the fact that the complaint, the facts and the law fail to sustain a claim for relief, and also the motion for a directed verdict is based upon the fact that the allegations as contained in the complaint are insufficient to prove that the plaintiffs were engaged in the business within the meaning of the term in the Revenue Code and also the facts and the law as presented in this case are insufficient to warrant a jury finding that plaintiffs were engaged in a business as interpreted by the Internal Revenue Code of 1939.

(The motions were argued. During the course of the argument Mr. Gillard made this additional motion:)

Mr. Gillard: If the Court please, may I conclude one phase of this matter which Mr. Morgenstein did not touch upon, [282] and really prior to making the last motion we should have, and I now move the Court for permission to amend paragraph 2 of the

11th count of the answer and paragraph 2 of the 13th count of the answer. Those two paragraphs relate to paragraphs of similar number in the same and similar count numbers in the complaint. Referring to the complaint, paragraph 2, the 11th count, it is alleged, "In addition plaintiff, Maurice P. Koch, advanced in behalf of Beacon Pictures Corporation \$15,000 from the community funds of his wife and himself upon the same basis that the aforementioned \$75,000 was advanced. Said \$15,000 was also lost in 1947."

The answer, which was drawn in Washington prior to the receipt of the administrative files in this office, and prior to any pretrial work, says with respect to that allegation, "Admits, except to deny that this transaction was other than a loan, and except to deny that the basis of this loan was the same as the basis of the \$75,000 loan."

There is a similar allegation in paragraph 2 of count 13, which is the cause of action on behalf of Mr. Koch's wife, Daisy Koch, and the answer of the Government is the same. We request the Court for permission to withdraw that answer and to substitute in lieu thereof the following:

"Denies all the allegations contained in said paragraph."

The reason for the motion is that we believe the evidence [283] as adduced and as produced by the plaintiffs shows that Maurice P. Koch did not advance any personal monies which were involved in this transaction. He did not advance any money to Beacon Pictures Corporation, and he did not lose

any money. The testimony is, as the Court will recall—and it came out just this afternoon for the first time—that these monies that were advanced, the first \$17,500 which was advanced was the money of H. Koch & Sons. Thereafter, because of the financial stress of H. Koch & Sons, Maurice Koch went to Mr. Farilla and borrowed \$15,000 over a period of several months. The last of those borrowings were specifically in accordance with the testimony of the witness because the corporation did not have the money and could not pay. The last one in December, 1946, was subsequent, and all payments had been made for or on behalf of Beacon Pictures Corporation. Merely by entering those borrowings into the investment account the Beacon Pictures Corporation cannot transmute the loan that was made by H. Koch & Sons from that partnership to Mr. Koch individually.

Secondly, the testimony is clear, as Mr. Morgenstein has just indicated, that the loans were made to Sebastian and Hersh and not to Beacon Pictures Corporation.

Third, the evidence is clear that there is no evidence that the money was lost. There was no demand ever made on Sebastian or Hersh for the collection of that money. Therefore we move that we be permitted to withdraw the answer and amend [284] as we have requested to be consistent with the evidence produced by the plaintiffs herein.

(Motions discussed further.)

(At the conclusion of all argument the Court made the following ruling:)

The Court: The motion of the Government to amend counts 11 and 13 of the answer may be denied.

The motion for a directed verdict against the plaintiff, Maurice Koch, individually may be granted, and the motion for a directed verdict as to the remainder—and I am speaking, when I say Maurice Koch, I am speaking of the \$15,000 alone at the moment. As to his interest as plaintiff in the remainder of the thing the motion is not granted, and the motion for a directed verdict as to all of the plaintiffs generally as to the \$75,000 involved may be denied.

The motion is denied under subdivision b of Rule 50.

Mr. Gillard: So the record may be clear, Your Honor, that \$15,000 was divided between Maurice P. Koch and his wife, Daisy Koch.

The Court: Then as far as the \$15,000 is concerned, as it applied to Maurice Koch and Daisy Koch, his wife, the motion for a directed verdict as to that amount and those persons named in that account may be granted. I would like to see counsel in chambers as to the instructions.

Mr. Fink: I was wondering if we might not require certain [285] stipulations at this point, in view of the nature of the special interrogatory we are going to submit to the jury.

The Court: I was going to do that in chambers. We can do that here while the reporter is here.

Mr. Gillard: Prior to that time, if Your Honor please, the Government will rest its case.

The Court: May it be stipulated by both parties that in view of the Court's rulings up to this time, that the only issue to be presented to the jury is the special interrogatory which reads as follows:

"During the year 1947 was H. Koch & Sons regularly engaged in the business of financing motion picture ventures? Yes—no."

May that be stipulated?

Mr. Fink: So stipulated.

Mr. Gillard: So stipulated.

The Court: May it be further stipulated that thereafter, after such special interrogatory has been submitted to the jury, that all motions, issues and facts involved in the case are to be determined by the Court unless the parties stipulate as to such motions, issues or facts?

Mr. Fink: So stipulated.

Mr. Gillard: So stipulated.

The Court: Are there any further stipulations that are required? [286]

Mr. Fink: I do not believe so, Your Honor.

The Court: I would like to see counsel in chambers.

(Counsel for the respective parties then adjourned with the Court to the Court's [287] chambers.)

Thursday, November 29, 1956

(The following proceedings were had in the Court's chambers, there being present the Court, counsel for the respective parties, the reporter, but no jurors being present:)

Mr. Fink: We are all assembled here now. The record may so show.

Comes now the plaintiffs and each of them and moves this Court for a directed verdict in favor of the plaintiffs; in the alternative, that the jury be instructed to return a "Yes" answer to the interrogatories being propounded to them pursuant to the stipulation.

Said motion is made upon the grounds as follows:

First, that the parties plaintiff to this action heretofore, and on the 23rd day of October, 1944, entered into a solemn contract between themselves which reads, among other things, as follows.

And I turn to paragraph 1 of Exhibit 2:

"The said partnership business will, in addition to engaging in those activities referred to in the existing partnership agreement, engage in the business of financing motion picture productions either by direct participation in such productions by way of stock investments or loans to motion picture producers or in any other form of financing that said partners [288] may mutually agree upon between themselves. It being understood in this connection that the said partnership may carry on such business as aforementioned either as joint adventures

in association with others, strangers to this partnership, or with any other person, firm or corporation the said partners deem advisable.”

To hold in this case that the partners, after their solemn contract as between themselves, and which gives the only right for taxation that the Government may have, to hold in effect in any manner, shape or form these partners are not engaged in the manufacture of motion pictures when they have by their solemn contract so contracted to do would breach the form of contract and be contrary to the position contended for by the defendant.

Secondly, since there is no evidence in this case sufficient upon which reasonable men could possibly find that the plaintiffs were not engaged in the business of motion picture financing, both under the terms of their solemn contract as well as under the facts of this case.

In this regard it is our position that the parties having contracted between themselves to engage in the business of motion picture financing have, first of all, be foreclosed from their inquiry into that subject by the taxing authorities.

Secondly, that the facts in this case tend in every respect and only to establish that they did so engage pursuant to their agreement so to do. [289]

The Court: The matter may be submitted?

Mr. Fink: Yes, Your Honor.

The Court: The motion may be denied.

(Thereupon the Court convened in the courtroom, and in the presence of the Court, the

jury, and counsel for the respective parties, counsel made their closing statements to the jury, at the conclusion of which the Court instructed the jury as follows:)

The Court: It now becomes the duty of the Court to instruct the jury upon all questions of law. It is your duty to follow the instructions of the Court and to accept the law as given you by the Court. You are, however, the sole and exclusive judges of all questions of fact and of the weight and effect of the evidence and of the credibility of the witnesses. Your power of judging the effect of the evidence, however, is not arbitrary but is to be exercised with legal discretion and in accordance with the rules of evidence.

You are not to consider for any purpose any evidence which has by the order of the Court been stricken out, or the offer of any evidence which has not been admitted by the Court.

The statements and the arguments of counsel, and any purported statement of fact contained in any question asked by any counsel of any witness are not evidence in the case, and any statements made by a counsel either during the trial or during the argument, which are not supported by the [290] evidence, or which are inconsistent with my instructions as to the law, are to be disregarded by you. This, however, does not apply to stipulations of fact by counsel, which stipulations of fact must be treated by you as facts proven in the case.

In these instructions the Court is expressing no

opinion upon any of the issues required to be determined by the jury.

All principles of law given in these instructions are of equal importance. In civil cases, which this is, the affirmative of the issue must be proven by a preponderance of the evidence. The affirmative here is upon the plaintiff as to all of the affirmative allegations of the complaint which have not been admitted by the answer. If the evidence is contradictory, your decision must be in accordance with the preponderance thereof. When the evidence in your judgment is so equally balanced in weight and quality, effect and value that the scales of proof hang evenly, your verdict should be against the party upon whom rests the burden of proof.

This is an action brought against the United States Government by three brothers and a sister, to wit, Harold M. Koch, William L. Koch, Maurice P. Koch and Rebecca Koch Abel, together with the wives of the three brothers, for the refund of income taxes paid while the three brothers and the sister were members of a partnership known as H. Koch & Sons. The years for which the refund is claimed were the years 1947 and 1945. During those years the partnership of H. Koch & Sons [291] filed an income tax return and the individual partners paid taxes thereon. Later in 1949 the partners and their respective wives, who are the plaintiffs in this action, filed an amended income tax return for the year 1947, and later filed a claim for a refund with the Commissioner of Internal Revenue, contending that there had been a business loss in

the business of the partnership for the year 1947, and that inasmuch as this loss was greater than the income for 1947, that they were entitled to use the amount of the loss in excess of the income for that year to offset any gain in the prior year of 1945.

Thereafter the Commissioner of Internal Revenue made a determination that the loss incurred by H. Koch & Sons was not as a result of a business bad debt but that the loss occurred by reason of a non-business bad debt.

Thereafter plaintiffs filed this action against the United States, and in that complaint affirmatively alleged that the loss incurred by the plaintiff was one incurred while H. Koch & Sons was regularly engaged in the business of financing motion picture ventures.

The complaint alleges that the Collector of Internal Revenue notified the plaintiffs that in his opinion the loss in question was a non-business bad debt and refused to allow the full deduction claimed by the plaintiffs.

It is admitted in this case that H. Koch & Sons is a copartnership consisting of Rebecca Koch Abel, Maurice P. Koch, [292] Harold M. Koch and William L. Koch. It is conceded by the Government that the partnership did suffer a loss through the year 1947 in the amount of approximately \$75,000 in connection with a certain motion picture venture. However, under the provisions of the income tax law the entire amount of this loss can be deducted

in the years 1947 and in 1945 only if it was the type of loss which permits such a deduction.

The plaintiffs in their complaint allege that the loss was either a business bad debt, a loss incurred in the business of producing motion pictures or a joint venture in the business of producing a motion picture, to wit, "Copacabana," and that in any case it constituted a loss from a business regularly carried on by H. Koch & Sons.

The Government, on the other hand, contends that the loss incurred was not one which was incurred in the trade or business regularly carried on by the plaintiffs, but that it did result by reason of a non-business bad debt. The law provides that if a non-business debt becomes worthless within a taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange of a capital asset, and that the treatment for income tax purposes of that loss would differ, depending upon whether H. Koch & Sons was regularly engaged in 1947 in the business of financing motion picture ventures.

The law provides that the taxpayer gets certain credit over a period of years upon his income tax return by reason of [293] the loss of a capital asset, but those credits do not permit him to take the full loss by offsetting that loss against the business income for the particular years in question, unless the loss resulted from a business regularly carried on by the taxpayer.

The question here to be determined is whether H. Koch & Sons were in 1947 regularly engaged in the

business of financing motion picture ventures. In determining that question you should consider all of the evidence which has been admitted in the case. The question of whether the debt is one the loss from the worthlessness of which is incurred in the taxpayer's trade or business is a question of fact in each particular case. The statute does not give a definition for the word "business." Accordingly, in determining whether H. Koch & Sons was regularly engaged in the business of financing motion picture ventures you should consider the word "business" to have its ordinary, common and accepted meaning. A taxpayer may engage in or regularly conduct one or several businesses at the same time. The amount of time as well as the proportionate amount of capital devoted to a particular business are each factors among other factors to be considered in determining whether or not one is regularly engaged in a particular business.

If a taxpayer regularly and continuously participates in business ventures in which he is not only financially interested but to which he devotes a substantial part of his time, such [294] activities may make such ventures a trade or business of the taxpayer. Isolated or infrequent transactions of a taxpayer in any field do not constitute a trade or business within the meaning of the Internal Revenue Code.

In determining whether an activity of a taxpayer is a trade or business you should consider among other things how extensive was the activity, the financial investment therein, whether it was regu-

larly carried on, and whether the activity occupied a substantial portion of the time, energy and effort of the taxpayer.

Taxpayers may act through employees, agents and other persons, firms and corporations appointed by such taxpayers, and the acts of such employees, agents or other persons, firms or corporations appointed by the taxpayer are in contemplation of law the acts of the taxpayer. Thus in considering the activities of the taxpayers in the instant case with relationship to the conduct, if any, of the business or enterprise, you are required to consider that the acts of any such employees, agents, persons, firms or corporations appointed by them are in fact the acts and the activities of the taxpayers.

The authorized act or acts of any one partner of H. Koch & Sons in connection with the partnership business or activities are in contemplation of law the act or acts and activities of all the [295] partners.

The burden of proof in this case is upon the plaintiffs to prove by a preponderance of evidence that the loan by plaintiffs to the Beacon Pictures Corporation was a loan made in plaintiffs' regular trade or business. There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion pictures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by a preponderance of evidence that they were engaged in

the trade or business of financing motion pictures.

By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probability is in favor of the party upon which the burden rests. Preponderance of evidence means not the greater number of witnesses but the greater weight, probability, quality and a convincing effect of the evidence and proof offered by the party holding the affirmative as compared with any opposing evidence. If the scales of proof hang evenly the verdict should be against the party who has the burden of proof.

In determining whether any issue has been proven by a preponderance of evidence you should consider all of the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from [296] evidence that favors his cause or defense when produced by his adversary as when produced by himself.

If you believe that Maurice P. Koch used his own money in any transaction and was acting therein in his own behalf and not on behalf of H. Koch & Sons, that transaction cannot be considered by you in determining whether the partnership of H. Koch & Sons was engaged in the business of financing motion picture ventures.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case. There are a few standards or rules by which you can measure the testimony of

the witness and evaluate it and determine whether or not you want to believe it or how much of it you want to believe. The character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of the witnesses while on the stand and may consider their relation to the case, if any, and also their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by his interest in the case, if any, or by his bias or prejudice, if any, or by contradictory evidence.

A witness may be impeached by contradictory evidence or by [297] evidence that on some former occasions he made statements or conducted himself in a manner inconsistent with the present testimony as to any matter material to the cause on trial.

A witness wilfully false in one part of his testimony is to be distrusted in other parts. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of a mistake or inadvertence, but wilfully and with a design to deceive, then you may treat all of his testimony with distrust and suspicion and may reject it all, unless you shall be convinced that he has in other particulars sworn to the truth.

You may also consider the manner in which a witness may be affected by the results of your verdict. You may also consider the extent to which he may be corroborated or contradicted by other evidence and, of course, finally any matter in general which you contend reasonably sheds light upon the credibility of the witness may be considered by you.

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against either party to the action. Your verdict is to be reached upon the evidence produced upon the trial of this case, and you will not permit speculation, conjecture or sentiment to influence you one way or the other. [298]

A corporation is an artificial person. It must necessarily act through its servants, agents and employees. An act of an employee within the scope of his employment is the act of his employer. This case should be considered by the jury the same as if it were an action between persons of equal standing in the community. The fact that the defendant is the United States should not affect or prejudice your minds in any way, but the rights of the parties should be determined upon the evidence introduced in the case and the instructions given to the jury, which is the law and the only law to guide you in your deliberations.

The computation of income taxes is a complicated process and it is a very difficult matter to determine the exact amount which may be due. As I have stated, it is the function of the jurors to determine questions of fact. The question of fact in this case

is whether in 1947 the partnership of H. Koch & Sons was regularly engaged in the business of financing motion picture ventures. Accordingly, counsel on both sides have agreed upon a procedure which will simplify your labors in this case. It has been agreed that there will be submitted to the jury a certain question, and the jurors are merely to determine whether its answer to that question is in the affirmative or in the negative. The plaintiffs contend that your answer to that question should be in the affirmative. The defendant contends that your answer to that question should be in the [299] negative. When the question is answered, certain legal conclusions follow therefrom which will be determined by the Court, and the proper amount of income tax to be paid by the plaintiffs for the years 1947 and 1945 will be ascertained.

It is your duty as jurors to consult with one another and to deliberate with a view of reaching a verdict if you can do so without violence to your individual judgment. To each of you I say you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote for either side nor be influenced in so voting for the single reason that the majority of the jurors are in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinion

of the other jurors. Your verdict in this case, of course, must be unanimous.

Counsel, I am about to conclude my instructions. Is there any matter you desire to take up in the absence of the jury?

Mr. Gillard: Yes, your Honor.

Mr. Fink: No, your Honor.

The Court: There has been prepared for your convenience, as I have indicated, a special verdict. Omitting the title of the court and cause, this special verdict reads as follows: [300]

“During the year 1947 was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?”

Answer, with a blank line, and then a blank line for the signature of the foreman.

If your answer to that question is “Yes,” your foreman will write the word “Yes” in the blank space provided and will sign the verdict to which you have agreed. If your answer to that question is “No,” the foreman will write the word “No” in the blank space and will sign the verdict at the place indicated.

If you desire to see any of the exhibits that have been introduced in evidence, if you will advise the Court officer, they will be delivered to you to the jury room.

Upon retiring to the jury room you will select one of your number to act as foreman. This foreman will preside over your deliberations, will sign the verdict to which you may agree, and will represent you in any future proceedings in the courtroom.

The person so selected should permit a full and fair discussion of the case, and the other jurors should assist the foreman in keeping the proceedings orderly and in expediting the proceedings in the jury room.

You may now retire and deliberate upon your verdict.

Mr. Gillard: If your Honor please, in response to your question we said yes, we did have some matters we would like to take up in the absence of the jury. [301]

The Court: Mr. Gillard, I asked you and I heard no answer and I went on.

Mr. Gillard: I said, "Yes, your Honor, we do." I am sorry.

The Court: I beg your pardon. I did not hear you.

(Thereupon, the Court and counsel for the respective parties adjourned to the Court's chambers, and in the absence of the jury the following took place.)

Mr. Gillard: If your Honor please, we would like to take exception to certain of the instructions given and certain of the instructions proposed by the Government which were not given.

We take exception to those portions of the charge given as follows: That portion which stated that the jurors are to consider all the evidence submitted in the case. We take exception on the ground that this is erroneous, that much of the evidence relates to conduct of the corporation and officers of the cor-

poration which we feel is not attributable to the partnership.

If your Honor please, we take exception to that portion of the charge which states to the jury the term "business" in the Internal Revenue Code is to be considered as having its ordinary meaning. We feel this is an erroneous application of the law as stated by the Supreme Court, and allows the jurors to consider facts which should not be considered in determining [302] the meaning of the word "business."

We also take exception to that portion of the charge which states that taxpayers may act through agents and corporations, and those acts of those agents and the corporations are to be considered as the acts of the taxpayers themselves. We feel as applied to this case, your Honor, this is an erroneous statement of the law as applied to the facts, in view of the fact that most of the activity was done by the corporations themselves, and since the issue in this case is whether H. Koch & Sons was a partnership regularly engaged in the business, the acts of the corporation in which the partners are officers, stockholders or members should not be considered as the acts and conduct of the partnership itself.

We also take exception, your Honor, to the failure to give certain charges requested by the defendant and those are as follows:

The defendants requested Instruction No. 5, to the effect that investing and financing is not a trade or business and should not be considered as a trade or business. We feel the failure to give——

The Court: The instruction is set out. It will be filed, so the record will show what 5 is.

Mr. Gillard: We feel the failure to give this instruction results in prejudice to the defendant, in that in relation to the other instructions given it allows the jury to consider as [303] evidence the financial activities, activity which cannot be considered a trade or business within the meaning of the Internal Revenue Code.

We also take exception to your Honor's failure to give Charge No. 6, proposed Charge No. 6, to the effect that—or your modification of Charge 6, that the activity may be a substantial portion instead of a major portion. We feel that the proposed instruction is a proper statement of the law, and that as given to the jurors in relation to the entire charge will allow the jurors to determine that a trade or business did exist when no such trade or business could exist within the meaning of the Internal Revenue Code.

We also take exception to the failure of your Honor to give Defendant's proposed Instruction No. 7, which relates to the fact that a partnership, that the mere fact that a partnership was formed does not mean the taxpayers are engaged in a trade or business. We feel a failure to give this charge in relation to the other instructions given to the jury results in the jurors being able to determine that a trade or business was regularly carried on merely by looking to the existence of a partnership agreement. We feel this is not the law, and in re-

lation to the entire charge any such finding by the jurors would be erroneous.

If your Honor please, we take exception to the Court's failure to give Charge 8 as requested by the defendant to the [304] effect that the business carried on by the corporation is not the business carried on by shareholders and directors. We feel the charge proposed by the defendant is a proper statement of the law, and in the situation and facts presented to this jury the jurors are now able to determine that the acts of the officers while carrying on corporate activity are the acts of H. Koch & Sons, the partnership itself. We feel that such is not the law, and such an instruction, when failed to be given in relation to the other instructions, is clearly erroneous and results in prejudice to the defendant.

We also except your Honor's failure to give Charge No. 9 as proposed by the defendant, to the effect that the activity of Maurice P. Koch as shareholder, officer and director of Producers Finance Corporation cannot be considered the activity of H. Koch & Sons. We feel that the instruction as proposed by the defendant is proper, and by failing to give this instruction in relation to the other charge results in prejudice to the defendant, in that the activity of Maurice P. Koch as a corporate officer may now be considered by the jurors as the activity of H. Koch & Sons in determining whether or not H. Koch & Sons was engaged in a trade or business.

If your Honor please, we also take exception to the Court's failure to give defendant's proposed in-

struction appearing on the first page of the supplemental instructions, to the effect that the jurors are instructed that an income [305] tax deduction is a matter of legislative grace. We feel the failure to give——

The Court: Don't repeat the same statement, counsel, which you do after each instruction. When you make your objection then make a general statement if you wish, but you have been repeating the same one after every instruction.

Mr. Gillard: There have been certain modifications. However, in this charge we feel there is not sufficient weight given to the internal revenue laws of the United States.

Mr. Fink: May we, in view of the exceptions taken, have the exceptions of the plaintiff at this time? The plaintiff excepts to the failure of the Court to give Instruction No. 13, instructing the jury that the jury may consider in determining whether or not H. Koch & Sons is engaged in the business of financing motion picture ventures the amount of time and effort expended in that direction, whether or not actual ventures were concluded.

In addition, we respectfully except to Instruction No. 15 to the effect that in considering the question of whether or not H. Koch & Sons devoted a substantial time to the financing of motion picture ventures the jury is required to consider all of their activities relating to that purpose of whether or not actual financing was concluded.

We also except with respect to the instruction given by the Court that the jury may disregard all

the activities of [306] Maurice Koch if such activities involve only him, his own funds, having been particularly held by this Court that as a matter of law all of Maurice Koch's activities in the motion picture business, the business of financing motion picture ventures were for and on behalf of the partnership rather than his own behalf and a motion having been granted by reason thereof.

The Court: Very well.

(Thereupon, the Court and counsel returns to the courtroom, and in the presence of the jury the following occurred.)

The Court: The formalities have now been completed and you may now retire to deliberate upon your verdict. You may now retire.

(Thereupon, at 1:45 p.m. the jury retired to deliberate upon its verdict.)

The Court: May it be stipulated, gentlemen, in the event the jurors desire to see the exhibits in the case that they may be delivered to the jury by the Court officer without further order of the Court?

Mr. Fink: So stipulated.

Mr. Gillard: So stipulated.

(Thereupon, at 5:35 p.m. the jury returned to the courtroom and the following occurred.)

The Court: Let the record show the jury is present. Ladies and gentlemen, have you agreed upon a verdict?

The Foreman: We have. [307]

The Court: Mr. Phipps, you are the foreman, are you?

The Foreman: Yes, sir.

The Court: Hand the verdict to the Court officer, please. Mr. Clerk, omitting the title of the court and cause, will you read the special verdict and ascertain whether that is their verdict?

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as you have rendered it:

During the year 1947 was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?

Answer: No. Signed "Charles L. Phipps, Foreman."

Is that your verdict as rendered?

(All members of the jury indicated in the affirmative.)

Mr. Fink: If the Court please, may we poll the jury?

The Court: Mr. Clerk, poll the jury. Ladies and gentlemen, as your names are called, if your verdict was as read by the Clerk, please answer "Yes."

(The jury was polled, each juror answering in the affirmative.)

The Court: The verdict may be recorded.

Ladies and gentlemen, thank you very much for your service in this case. You are excused from further attendance, and the Clerk's Office will notify you when you are required to appear again. You may now retire.

Mr. Fink: The plaintiff hereby moves the Court for judgment [308] notwithstanding the verdict. I do not know whether your Honor wants to take that matter up at this time. More appropriately it can be taken up at some other time.

The Court: Just as you please, counsel. By reason of the fact that you are from out of town I would make the hearing of that at your convenience.

Mr. Fink: Perhaps we could have the hearing sometime tomorrow at your Honor's convenience?

The Court: Very well, ten-thirty tomorrow morning. [309]

November 30, 1956, 10:30 A.M.

Mr. Fink: If the Court please, come now the plaintiffs, in order to clarify our motion, and move for a judgment notwithstanding the verdict and a judgment in favor of the plaintiffs and each of them, and likewise move that the special finding of the jury be vacated, set aside, and judgment entered for the plaintiffs notwithstanding such special finding. We take the law to be that a motion for a new trial at this particular juncture in this special type of proceeding would be premature insofar as the plaintiffs are concerned, in that judgment has not been entered, and the plaintiffs reserve the right to move for a new trial at a subsequent time after the entry of judgment in this cause. On the other hand, we assume the state of the law to be that the Court may at any time on its own motion grant a new

trial, that is, at any time up to a period of ten days following the entry of judgment.

(The motions were argued by both counsel, at the conclusion of which the following occurred:)

The Court: This motion may be submitted. I take it there are two motions here, a motion for a judgment notwithstanding the verdict and a motion that the special verdict be set aside.

Mr. Fink: Yes. I think we could clarify the record by taking one further step, and that is, neither side has any further evidence to offer in this case. [310]

Mr. Gillard: That is true. The matter was submitted.

The Court: It may be stipulated by both sides there is no further evidence in the case to be submitted.

Mr. Fink: Prior to judgment, yes.

The Court: Is that right?

Mr. Gillard: That is correct, your Honor.

The Court: The matter at this time may be submitted. [310-A]

November 29, 1956

The Court: The jury are present. Proceed.

Opening Argument to the Jury
On Behalf of the Plaintiff

Mr. Fink: If it please the Court, counsel, ladies and gentlemen of the jury, there may be certain facets of this case, due to the limited function the jury will play in this case, that are somewhat confusing at this time, but I believe we can relax because I believe when the discussions by counsel and the instructions of the Court have been given to you, this case will be a very clear and simple one for you to decide.

First of all, I would like to tell you the story about the law suit. H. Koch & Sons, a partnership, admittedly, consisting of four people we have talked about, three brothers and a sister, made their tax return for the year 1947, reported their income and paid their taxes. There is no question about that. Later on, due to the fact that the picture business, as you have been told and as you know goes on throughout the world, they found out in 1947 a certain film that they had money in went dead and the thing was a total loss. So they amended their tax return, filed their amended tax return, which is in evidence here, and they asked for a refund of their tax money. These papers were with the various Government agencies over a period of some years and it was finally turned down, so they brought the law suit to get back the taxes they paid.

A law suit is always made up, first of all, of a complaint. You file your law suit and tell your story about what you complain and circumstances that surround it. In this case the pleadings, which were the complaint and the answer, the complaint showed that H. Koch & Sons is a partnership, that in the year 1947, which is our year in question, they sustained a loss by reason of certain funds they advanced and became lost in that year, and that as a result, instead of having paid taxes, they were entitled to a refund, each one of them for the taxes paid.

Then the answer to the case can either admit everything that they said or can deny it, or it can admit part and deny part. In this case the answer, I believe prepared by somebody back in Washington, was filed in this case and says, "Yes, we admit you were a partnership. We admit you paid your taxes. We admit you put some money into some pictures. We admit you lost your money. We admit everything, except we say but—" This answer says—"but, although you are ordinarily entitled to deduct your losses, in this particular case the loss which you have incurred here is a non-business bad debt. It is not proximately related to your business, and therefore because it is a non-business bad debt—" that is the "but" of this particular answer—"we are not going to allow it." [2*]

So the question arises, was the debt incurred in a business or was it a non-business bad debt? Of course, I know that you all agree under our de-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

mocracy anyone who claims they have something coming has a right to come to court and bring their lawsuit. He has the right to have the case tried before a jury of their neighbors in this community. I know that you realize also just because someone claims, files a lawsuit and makes a claim does not mean they are entitled to collect or entitled to win, and by the same token I know you also know because somebody denies your claim, a part of it, does not mean that they have any good defense.

This case, as we have mentioned, gets down to only a single question. I know that some of you tried cases before. In most cases it was a matter perhaps involving how many dollars and cents should the jury give, but in this case that is not present because we all agree we followed the tax tables in determining how much the plaintiff is entitled to. There is only one question left open in this case and that is, was this a non-business bad debt or was it a loss incurred in a business regularly conducted? And all of the testimony in this case which does not bear on that issue, so far as we are concerned, is no longer important, because all you are going to be called upon to answer, I believe—right now I do not know what the Court will instruct you, but I believe all the Court will tell you is that all you have to answer is yes or [3] no to the one single question that will be propounded to you, and that is going to be the limited function of the jury in this case. That is the only question open in the case really and that is whether H. Koch & Sons was engaged in the business of financing motion

picture ventures. It is as simple as that. You will answer yes or no and this case is over.

We talk about a business, and I think when you come to court you do not leave your common sense home. The word "business" here, I believe the Court will tell you, means the same as the word we use up and down the streets, in our homes and in the market place. The word means just that—business. It has no peculiar meaning, any different in the court room than it has in your ordinary life. However, I believe it would be well to examine what this business here consisted of.

To begin with, as I said, I don't know exactly what the Court will instruct you, but I believe the Court will tell you this, that any person or any firm can engage in any number of businesses. In other words, you can have a big business and you can have a teeny one, or you can have a dozen small ones. I know Miss Ernst and Miss Nordlund will tell you the Standard Oil Company have all kind of businesses. They are in the oil business, but they have other kinds of businesses, too. H. Koch & Sons is not any Standard Oil Company, but they certainly have the right to be, as the Court will tell you, in as many businesses as they want to be in. It doesn't [4] matter that they were in more than one business. They could be in any number they wanted to be in.

The Court will also tell you it is altogether possible for a person to have a big business and a small business, a business that they devote the major part of their time to and a business that they devote a

lesser amount of their time to. I think the Court will also tell you that they have a business which they devote their major assets to or their minor assets to. Still both of them are businesses. In this case we are talking about the motion picture business. When we talk about the motion picture business, that is quite different from most businesses. For that matter, I don't think the man who filed the answers in this case knew very much about the motion picture business. This is a business that is built on ideals. You just don't go out and put money in the motion picture business as you put it in stocks and bonds listed on the market. You start out and all you have is an intelligible, fleeting idea. If you take any of those ideas and follow them up, you are going to have an investment of over a million dollars. You have to start out, first of all, and you have to find a property in which you have confidence, a story. That is your foundation. You have to make sure that you acquire the property on the right terms so that you don't ever lose it, so that you can protect it. You are not going to build a 12-story building that cost you a million [5] dollars on a lot you don't own. The same thing is true. You are not going to make a picture based upon a story you do not own.

The next thing you have to have, you have to have, stars and, of course, the Kochs are not glamour people. They are hard-working people. They are not going to act in any pictures. They have to have stars. Not only that, but every picture has more than one star. It takes several stars. If you want stars for your

picture, you have to have them available all at the same time, because if one is making a picture in Europe and someone else is getting a divorce in Reno, you cannot start work. They have to be there when your stars are ready. The same thing is true with the director. We are talking, you know, about the independent motion picture business. This is not M-G-M, Paramount or Twentieth-Century-Fox, where they have the high-priced people under salary and know their backing. These pictures start out with a group of men who have their hands in their pockets and that is all. They have to find a studio that will rent them some space, having stages, cameras, laboratory facilities. They have to hire a complete staff, and all the time they are working on an idea. And, you know, one of the toughest jobs in the world is the creative job of following through on an idea. You get many of them. You follow through on them. You sleep on them by night, wake up with them in the morning, take them to lunch, dinner and [6] breakfast with you. You think about them all day long, and you work with them all day long. It is very intangible, and you have very little to show. What you are really doing, until that camera starts to grind, you are really experimenting, and we all know when you are experimenting you have many experiments that start but very few that end up. They start out in the picture business in some respects similar to the way they start in the oil business. A man goes out and finds the land. He gets together interested people. They get the machinery

to drill the well with. They start out and they hit a dry hole. Because they hit a dry hole does not mean they were not in the oil business. The question, is where did they devote their activities? When you experiment with something as you do with a picture until you get it all together, all packaged—let me tell you something. We have had a number of documents in evidence here. They remind me of the iceberg. They say that only about two per cent of the iceberg you see floating in the ocean is above water and is the part that you can see. Ninety-eight per cent is below the water. You can't even see it. Every one of these papers—they are just about two per cent—they are just the things that we can now see and tangibly bring to you.

But the thinking, the planning, the hoping, the trying to get in to get a star, trying to get a studio, trying to get the important people you have to get in touch with, [7] negotiating with them, getting money together—all these things that you can't see here at all, these just are little things that happened. Obviously you can't sign a contract with a star or a director or have a studio—you prepare all the contracts, but there is no use in committing yourself to use a star on January 1st and pay him \$150,000.00 if you haven't got everything else that goes with it. So the contracts build up. You don't sign them until you have everything together at one time. You don't permit yourself to use a studio when you have nobody to put in that studio. Of course, one of the things you have to have is a release for your picture. You can't make the film and

take it home with you. You can't put it away in a vault. This picture is made for release. You have to have a release throughout the whole world to get your money out of it, some selling organization that operates throughout the world. They are few and far between. So all this talk you have heard here about things that didn't work out, these are the pains, the headaches that are normal and natural to this piece of experimentation and, frankly, I don't believe we had any showing in this courtroom to the contrary.

When you get into the picture business, that is a big piece of business. There is no single group of people who have independently gone out to do feature pictures, who have done too many of them in a lifetime. Each picture deal is a [8] tremendous milestone. It generally requires years to get one completely through. You have many starts, many attempts.

I am reminded of the days when I was much younger. I lived in Oklahoma. We used to live in a very small town. That was a day of the so-called drummer traveling salesman. He used to come up those dirt roads and go from village to village, from town to town and sell his goods. On Saturdays the stores were busy and they couldn't work. They stopped at a small inn that was near and they would get into a conversation. The story is told that one rainy Saturday afternoon one of these drummers said hello to another fellow he didn't know. He said, "How's business?"

He said it wasn't bad. He said, "I sold 200,000 white last week, 150,000 pinks, 100,000 blacks and

100,000 yellows and some reds." He said, "How's business with you?"

The fellow said, "I haven't had a sale in 18 months, not a single sale in 18 months."

The first fellow said, "You haven't had a sale in 18 months? What are you selling?"

He said, "I am selling steel bridges. What are you selling?"

He said, "I am selling jelly beans."

When you get in the picture business, you aren't doing business with jelly beans. You are not selling groceries. You are getting together a tremendous project and hope all [9] the elements of this project will somehow get together, coagulate so that you have a successful picture.

Insofar as the picture business again, I want to mention to you you are not buying something you are going to take home and put away in your vault, like an investment of your savings. You are not buying something for yourself. You are actually making something for resale, which is in itself the business.

I would like to turn for a moment, since we have had a view, first of all, of the general nature of lawsuits and, secondly, what this picture business is about, and I am pretty sure having heard the testimony you heard, you have a pretty good idea about it now, if you did not have before you came here. Let us turn for a moment to the Koch family. I think there is one thing we are all convinced of here, and that is these people are good people. I

don't think anybody can doubt that. They paid their taxes and they lost their money. This is all admitted. There is no question about it. And just thinking about that lawyer's testimony. He was a young lawyer starting out and his wife had to go to the hospital. I am thinking of Pop Koch, the father, gone to his eternal rest. And it reminds me of an ancient story about the old father who had is four children with him. He was going to die and he said to his children, "Bring me sticks." So they brought the sticks. He took one stick and he broke it and tossed it away. He took four sticks and put them together. [10] He couldn't break them. And he said, "See, my children, I want you to know that you are like these four sticks, that together you have strength, separate each of you can be broken."

These four children of Pop Koch have stuck together, one-for-all and all-for-one. They have worked and they have tried. They have tried no doubt and they would have tried anything that would have made them successful. But I know that you know one thing, that these Kochs, one-for-all and all-for-one, that is the only way they are. No other way.

You have had the testimony from the witness stand with the single exception of this friend of Maurice Koch's, who came back from the Army, he and his wife lived at the home three months and he got involved in business with him—that is the single exception in all these years. There has been no business dealings except the partners, and these four children of Pop Koch stuck together. We know the

Koch family were making luggage. Mr. Koch was on the War Production Board. During the war with people being displaced, there was a big demand for luggage, if you could get the material to make it with, but the number of manufacturers just doubled, and their claim was that H. Koch & Sons at that time was a well-known brand but had no particular standing in the trade, just another company making luggage. He knew, and I think it was pretty good foresight, at least he thought that there was going to be tremendous competition and they were all going broke. He [11] thought, "I want to find something else to get into." When these people started to find something else to get into, you must bear in mind the only connections, the only affiliations, the only other business they had any contact with was the motion picture business. They also knew they were not actors, they were not directors. By the way, everybody down in Hollywood is not a glamour face. That is for the actors and actresses. But in the picture business no matter how many actors you have, no matter how many studios you have, how good your story is, no matter how many people you have working for you, you can't make a picture without money. You can't do anything without money, as we all so well know. The picture business comes down to two sides.

One side is called the creative side. That becomes worthless if you don't have the other part. It is like slicing a man's heart in half. Half of it is worthless.

The other side is money. You have to have money on one side: the creative side is the other side.

Money has to have financial management with it because creative people just are not given money without financial management. There is reason for that. A creative man wants to create, wants the greatest achievement of all time to stand as a monument to him for all eternity. The financial man knows he has so much money he has to make a picture with. You have those two elements that make up the picture business. [12]

The Koch family realized they had better start getting into something else just in case. They had Maury scurrying to his friends and associates in Hollywood to get into some picture ventures. As I told you, nobody makes a picture by himself in the independent field. It is always a group. They start and get together with all kinds of people. You heard the story, and I want to tell you again that in between each one of these pieces of paper, in between everything that happened there were days and nights of meetings, there were days and nights of trying to formulate, trying to do, and the Kochs get an A for effort in your book, I know. They went down there and put up all their money, too. This was no taking of some surplus funds and tucking this away in the old sock where it was safe. This was taking all their money and putting it into a business that is the greatest gamble in the world because you are experimenting and you might get a hydrogen bomb out of your experiment, or you might get a dry hole. You might get nothing.

They didn't take surplus money when they were overdrawn in the bank. This was their finances, this

was their cash, this was their money, this was really important. \$50,000.00, \$30,000.00, \$20,000.00, \$25,000.00, Producers Finance Corporation, a million dollars worth of Army pictures, training films—that is big, big business, and their end of it, they had a commitment each time to finance. Of course, they [13] looked to finance in 1947. Starting in 1946 and this year 1947 that we are concerned with, they looked to finance so-called pre-production. That is before the camera turns and you have no film to show. That is the most dangerous period, the biggest gamble of all because you may never have a film. If you have a film, at least you have something tangible, but that first money, the so-called pre-production money, the money you spend before the thing starts to jell, that money demands also the highest profits. As a result, we have \$80,000.00, \$50,000.00 and \$30,000.00 going into one certain film, this Copacabana picture, and he wound up by owning fifty per cent of the picture because they took the big risk, they went through tough sledding and they were entitled to a bigger piece of it. They watched it and worked on it.

The most remarkable thing in this whole case—and I will say to you, ladies and gentlemen, Mrs. Rorke, Mr. Snider and Mrs. Saudient—suppose that the three of you and myself got together and we had a contract, and our contract said we are going to be partners, and the contract says we are going to go into the picture-financing business. That is our contract, and somebody comes along and says, “You people may have agreed to go into the picture-fi-

financing business, or you may have agreed to get into a partnership to go into the building business, but we are going to file an answer and say "No, you are not in that business." Amazing isn't it? I [14] think you would be upset and I would be, and I am. Here we have Koch & Sons, this partnership between the four children, their business having started on January 1, 1942, on October 23, 1944, amended their partnership agreement, which is Exhibit 2 in this case, and this agreement says very plainly, "The said partnership business will, in addition to engaging in those activities referred to in the existing partnership agreement, engage in the business of financing motion picture productions, either by direct participation in such productions, by way of stock investments or loans to motion picture producers, or in any other form of financing the parties may mutually agree upon between themselves."

Here these people have a solemn contract with all four of their names on it, back in 1944 drawn up, way before the year 1947, in which they say, "We partners, in addition to being in the luggage business, we are going to branch out and go in the big business of motion picture financing. This is our business."

Lo and behold, the only question raised in this case by the Government really, the only thing they deny is, we are in the motion picture financing business. That is the only thing you are called upon to pass upon in this case. Were we or were we not? I say again, if you and I had such an agreement, if Mr. Snider had such an agreement, Mr. Phipps had such

an agreement, and somebody else has denied it and [15] you have to come to court and prove your case, you could see the position we are in. Of course, when you sue the Government you can't come in and sit down in a chair and win your law suit. We have the burden of proof. The plaintiff has to prove his case by a preponderance of the evidence. I believe the Court is going to tell you in this case that preponderance of the evidence is no difficult term. It merely means by evidence that when weighed with that opposed to it has more convincing force and in which it follows there is a greater probability of truth which lies therein. It is our duty to come in here and put on a case. We can't sit down and win the law suit. They have answered it and said we are not in the business of motion picture financing. We have to come in and prove that we had activities in that business, put in exhibits to show that we were so engaged. I know you won't be misled, won't be led by anything but a rule of reason. The evidence preponderates—that means if you have 10 pounds on one side and 10 pounds and one ounce on the other side, that the 10 pounds and one ounce preponderates over the 10 pounds. It is as simple as that.

In this case the evidence is clear. With all the stress, strain, and effort that they went through this entire year of 1947, and this money these people had tied up in that business, all their hopes and aspirations tied up in it, they were engaged in the business, and I say to you they could have [16] done one-tenth—one-tenth of what they did and still be regularly engaged in the business of financing mo-

tion pictures. They could have done one-tenth less than what they proved in this courtroom and still be engaged in the business of financing motion pictures, and it would not have mattered, ladies and gentlemen, in my opinion, whether any picture was ever made, whether any story was ever bought, whether any corporation was ever formed.

In that regard, you know about corporations. You call your lawyer and order a corporation just like you call your car dealer and order a Ford. Of course, that Ford is not going to drive itself. Somebody has to drive it. A human being has to drive it. It is not going to run without gasoline in the tank and that is the money you put in the corporation.

I believe counsel for the defendant will have a statement to make at this time and I will return with our rebuttal at some later time.

Thank you. [17]

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Fink: Those of us who have devoted our lives to the law must at times bow our heads in shame when we realize that in this very country of ours, before the courts of this United States, and perhaps only over a hundred years ago, however, people who were on trial were condemned to death for witchcraft only because attorneys were able to convince the people to believe evil when a half-decayed civilization would rather believe evil than good. I know, however, that we have selected you

people on this jury. I know that Mrs. Ernst, Mrs. Moses, Mr. Hamilton, Mr. Snider and the rest of you good people are not going to believe evil instead of good. You are not going to let evil make up for the fact that the defendant in this case has not produced one scintilla of evidence. With all the United States Attorneys' offices all over the country, with all the Treasury Department men and all the F.B.I., not one single bit of evidence of any kind that we could refute here in this case has been produced, not one iota.

An argument is made here in which everybody is a crook and everybody is evil. We start out——

Mr. Gillard: I am going to take exception to that, if your Honor please. I made no allegation of anybody being a crook or anybody being evil or anything else.

The Court: Proceed, counsel. [18]

Mr. Fink: Thank you, your Honor.

Everybody who testified in this courtroom was untruthful, that myself and Professor Schiller here are trying to slip something over, and when it is all said and done, ladies and gentlemen, when I told you the story about the law suit, just awhile ago, I forgot to tell you one thing, and that is that the lawyers such as counsel here who try many cases can argue anything, both sides of anything, no matter how right or how wrong. If you haven't got the facts, if you haven't got the truth, if you haven't got the right or the fairness, then you can't try the case; you try the counsel, you try the witnesses, you try to inject a poisonous venom of mistrust.

This is kind of routine and shameful, but I know that good people in this community, this world of ours, neighbors of my clients are not going to be misled into deliberate, unnecessary mistrust of anybody.

Counsel starts out and tells you it is the second crack at this case. You know, I have no quarrel with our system of government. I think it is the greatest system in the world, and if it was not, it is the best we know of. We don't know of any better system to administer things, and yet we can't say anything is perfect, can we? We know that in this country there must be, between individuals and corporations, a hundred million tax returns, or some such quantity, and they would fill up half this town if they were stacked in one place. [19] Some fellow in San Francisco or Washington sitting there looking at that pile of tax returns, claims for refund—and, by the way, who has had a lot of them that were not fair—there is no use kidding ourselves; there are people who would like to pay less tax rather than more—at a time when you have worked on stacks of those things, you get to the point where you distrust everybody and you get a frame of mind, which is human nature, that the Government is always right and the taxpayer is always wrong.

If we had not paid this tax in the first place, I do not think there would be any question of any law suit. They wouldn't sue us for the money. We paid the tax and they say, "Let them prove their case." That is what the counsel calls our second crack. This is our clear opportunity, ladies and gen-

tlemen. This courtroom has had many cases, it will have many more. His Honor will preside over them. Counsel has other cases. Some day I may have another case. But so far as the Kochs are concerned, this is their only case, their only chance to come before a jury of their neighbors to get justice.

When you start to nail up a box, ladies and gentlemen, sometimes you can ail it down with one nail. Counsel said when I picked up the agreement which says, "We are agreed that our business is the picture business," he says Mr. Fink believed that—and I do, by the way—he said, "Why did he [20] put in any other testimony at all?" The story is, ladies and gentlemen, that even though you can nail a box down with one nail, any lawyer knows you might as well put a few more nails in it and make it good and tight.

Counsel contends that you have a non-business bad debt if it arose from the situation that is only a casual or an isolated transaction, and I think His Honor will tell you that that is the law. If a transaction is an isolated thing, separate and apart from your business and only happens rarely, an isolated transaction, it is not a deductible loss under, the theory we have taken, so that it becomes a matter of importance to look into other things, and other things are proper to be proved, other nails we can drive into this box to nail it down.

We can show we had activities, we can show it was not just isolated; we had activities, spent time and money in connection with the picture business to show we were in the business of financing motion

pictures. By the way, we did not produce any pictures and do not claim that; we say nothing about producing. We are not actors, directors or writers, we wouldn't know how to paint a set or stage. We are financing picture ventures. That is how we got hooked, stuck. .

So that in addition to the obvious evidence in this case, we have the right to drive these additional nails by proving we spent time on other deals. Whether a deal was ever [21] concluded or not, does not make one whit of difference in this case. The question is, did we spend time and effort on it? That is all. Nothing more.

I believe His Honor is going to tell you—I am not sure, but I believe the instruction will be, if you listen for it, you will hear that you may consider the amount of time spent. Spent where? In the business of financing motion pictures. When you start financing something that was not there—this is not financing U. S. Steel Corporation or Standard Oil Company. This is financing companies that were never there to begin with. You have to start somewhere. We have to prove that we were in business, that among other things, when we were getting into it, we were actively engaged in trying to finance pictures and spent our time on it. That is all. Simple.

He talked about Frank Farilla, for example, the changing of books, making erasures. The only thing that whole transaction was offered for was to show the trouble Maury Koch or the Kochs went to to borrow money even for this picture financing. That is all they came in for in the first place. If Maury

had borrowed the money from John Jones or from any one of you ladies and gentlemen and spent time borrowing it, he got it. Of course, it came in on checks signed by Frank Farilla, and the books show that later on Maury said, "Don't do that. I owe Frank the money." So they changed the book to show it was Maury's money. It is that simple. It doesn't mean anything. [22]

But it does mean this, that not only were these people trying to finance moving pictures in the year 1947—and, by the way, I have not proved with respect to other years, we all know the time in question, 1947, the transactions that had something to do with that year. The only thing that \$15,000.00 Frank Farilla deal does is to give you additional proof that not only did they use every dime they had, but they went out and begged and borrowed everything they could for this business. That is all that deal was all about. And here the cross-examination and the insidious insinuations is a little bit disturbing, ladies and gentlemen. I hope you will bear with me on that. I am not very much persuaded by this argument that we should have deducted the loss in some way.

Our loss on Copacabana was \$75,000.00. That does not mean that \$75,000.00 is in tax money. You split that \$75,000.00 between the seven people and you get \$7,500.00 per person, and then you have to take it in your tax bracket. If you are in the 20% bracket, you get 20% back. We are not trying to get \$75,000.00 from the Government, you understand that. That does not mean our taxes would be af-

fectured to that extent. Only a small fraction of that. So it is not the most tremendous amount of money involved in this suit, but there is a principle involved. Any time an American citizen in your community has five cents coming, he is entitled to it [23] and he should have it. That is justice. That is the justice that we live and die for.

Counsel spoke about me—I guess I should not include Professor Schiller in this remark—we are like a destroyer laying down a smokescreen concealing everything. If I have concealed anything from you or attempted to take advantage of any situation under the sun, please forgive me because it was not intentional, and I think I can say without apology that every person who took the witness stand in this courtroom were good people. Let us not condemn anybody because they love Maury Koch. By the way, Maury Koch, super-salesman, as counsel makes him out, is probably a good salesman because of one thing. He is a very simple, straight-forward man of very simple words. He does have a little trouble expressing himself, but he is the kind of person I trust, you trust and people trust, because he is the simple kind that tried to explain himself as best he can. He wants nothing except what is his and what belongs to his sister and brothers. They have fought side by side for a long time and they are again here. They are finally in the courtroom.

Counsel said the contract says—I don't quite follow him—but for some reason Maury Koch was doing things beyond the contract; therefore it is not partnership business. The contract says all the

assets of the partnership are available for the picture business. I think His Honor will tell you the [24] act of one partner is binding on all the partners. There is no question about that. You use a contract one way and then use it just the opposite. I don't know what he is talking about. But I believe the Court's instruction on the law will tell you one partner's acts is the acts of all the partners.

He talked about Hill of the Hawk. The partnership didn't have the money. Of course, Mr. Koch told you they didn't have the money, he put the money up, sold out a couple of years later, got the money back and that was the end of that. But no matter what he did in the partnership business, it is covered by the contract, the partnership contract of the parties. Whether he invested more money than any other person or less money than any other person, of course, he did it for all of them. I don't doubt for a minute he would not be in this business on his own behalf, but that doesn't make any difference. We are going to show the various activities. This is not a case where he wanted and bought some stock in U. S. Steel Corporation, which would be an isolated transaction. This was a business. You start something where there is nothing. You go along with it and provide the financial management. You can have all the creative people in the world but somebody has got to say to them, "You got the money. I will be responsible for this," and that is what the Kochs did. I don't see how counsel can sneeze at that million dollars from the bank. There was the \$50,000.00 for Producers' [25] Finance

Corporation, which was organized by the Kochs through their lawyer with some dummies on the Articles. I don't see how we can overlook anything when these people spent money or the expenses borne by the partnership through all these transactions over the years.

Maury Koch's time was available. I think counsel has made that point, anyhow. His time was available to the partnership and the partner gave his available time. They had the right to use it. They gave this valuable time to this business. As far as whether or not he was engaged regularly in the business, ladies and gentlemen, I am a lawyer, and if I never won a case, I am still in the business of being a lawyer.

I will tell you something else. If I open my business this morning and never had a law suit or a client, I'm still a lawyer. You don't have to win law suits for clients to be successful. The question is, "What are you spending your time at? Is it a business?" That is a plain, ordinary term. You are either doing business or you are not doing business. It is just that simple.

Counsel said the letter, Exhibit 34, is inconsistent. Maury Koch was not writing a letter to counsel or the Judge. He was not trying a law suit when he wrote this letter. He wrote to his lawyer and he said—by the way, if anybody ever had an agent in a lawyer, he knows a lawyer is always his agent, but it is not a question whether somebody is your agent or not, [26] the question in this case is, if somebody does something for you, it is just like

your own activity. In other words, if you have something done, it is like you did it yourself. If Maury Koch sends me \$25,000.00 and says, "Buy a story," it is like he bought it himself, like William Koch bought it, Beck bought it or one of the other Kochs, and when he writes me a letter, he was not preparing for any law suit. Don't believe for a minute because something stands in the name of one partner, it does not belong to all. That is ridiculous and the contrary to every bit of law under the common law since the time of William the Conqueror.

He talked about the \$8,000.00 that came from Producers' Finance Corporation which, of course, Koch put into Producers' Finance Corporation. He put \$60,000.00 into that. All these things, whether he did or whether he did not, are not important. The Kochs spent their money, they spent valuable time. They were looking for deals they could finance in picture ventures. They organized corporations. They set up deals to get things started. They tried and tried and they were successful in a few things. They at least made a picture in Beacon, though they lost their money. They made 30 or 40 training films for the Government. They bought a wonderful story and other things. Like any other experimentation or any other thing where you are dealing with ephemeral ideas, you have to capture them and get them together. There are a lot of failures, [27] but they were activities. That is all.

Did they just go down and write a check out or did they have activities? If all a man did was write a check out once in his life on investments from

surplus funds, obviously that is not a business. But if he kept some degree of activity going and made an effort to spend money and time, then he is in the business. Doesn't that appeal to your good common sense?

The Court: You have five minutes, Mr. Fink.

Mr. Fink: I don't know, counsel seems to think that these people got to the Pacific Bank here in San Francisco by some kind of osmosis or something. The bank knew nothing about the picture business. San Francisco was removed from the scene. The only reason that the bank made that loan—you know the reason—they trusted the Koch family. That is all. They wanted to hear about Jack Chertok, not about corporation names, because, frankly, in this whole business corporations don't do a thing. It is the people that you have to trust. It is the character, the credibility of those people. I will tell you something, ladies and gentlemen. Any time you find a San Francisco bank trusting somebody for a million dollars, you can trust them, too. When you have a picture going into million dollar deals, do you think that they would trust these Kochs if they were exaggeraters and purveyors of untruth? If you don't trust any of us, if I am a charlatan, Professor [28] Schiller is a charlatan, and if every witness who took the stand is a charlatan, the evidence is here in black and white. The whole situation itself is more than adequate to establish that the answer is yes to the interrogatory you are going to have. If you didn't believe any of us—let us remember one thing, that the great big,

wide arms of the law—you have had this case a long time, have not been able to bring in one single thing to refute one single thing to this case. Everybody has a right to have a lawyer, including the Tax Department, and every lawyer's duty is to come into court and argue his case for his client. Of course, we sometimes forget we are officers of the court and are supposed to make statements based upon facts and not just try to inject the evil and disbelief where the world should be good, and we hope it is. I believe it is good. I believe you people are good. But I believe when you go into that jury room and you deliberate in this case, it is not going to take you very long to put "yes" down on that question that is going to be handed to you. The Kochs were engaged in the business of financing motion pictures. It doesn't say "producing"; it says "financing." I know when you retire to the jury room you will deliberate the same just verdict that you would expect other jurors to deliberate for you if you were on trial in this type of case.

I do want to thank you for your attention and time in sitting through these four days of trial. [29]

The Court: We will take a recess at this time until 1:15 this afternoon. That is a little unusual time, and I want everybody to remember it and be back here so we can start at that time.

You are still under the admonition not to discuss the case or form or express an opinion on it until it is finally submitted to you.

(Whereupon a recess was taken until 1:15 o'clock p.m. this date.) [30]

ARGUMENT OF MR. GILLARD, ASSISTANT
UNITED STATES ATTORNEY, TO THE
JURY ON NOVEMBER 30, 1956

Mr. Gillard: Ladies and gentlemen of the jury, the normal course of closing a civil case of this type, as indicated to you by Mr. Fink, is for the plaintiff to open the argument and for the defendant to respond; and then for the plaintiff to close. The plaintiff gets the last word. He gets the opportunity to leave the last impression with you, and he hopes the best impression in the case, and the reason for that is because the plaintiff has the burden of proof.

When you talk about burden of proof, you have to understand that what is happening here is that an individual—let us forget about the Government for a minute because that is not important in your thinking—an individual says to you, “You owe me \$5.00,” and you say, “No, I do not owe you \$5.00.” And so you go to court. He gets on the stand and he says, “That man owes me \$5.00,” and that is all. You get on the stand and you say, “No, I don’t owe him \$5.00,” and that is all the evidence there is. How would a jury decide that case? Only by virtue of knowing that the plaintiff is making the claim and has the burden of proving that the money is owed to him can you reach a satisfactory conclusion to that question, and if you say that the evidence is perfectly even, that there is no reason to believe or disbelieve one party or the other, it is a complete stand-off. Under those circumstances the judgment

cannot be for the plaintiff. So the plaintiff has the burden of proof, and that means proving to you by the preponderance of the evidence admitted in the case that they are right in their contentions, that they are entitled to the sum of money that they are claiming from the defendant, the Government.

In this case, and the Court will so instruct you, I believe, there is a presumption that the Commissioner of Internal Revenue's determination is correct. You see, the plaintiff already had one crack at this case. He filed his claim for refund with the Commissioner of Internal Revenue and the Commissioner denied it.

Mr. Fink: Your Honor, I am going to enter an objection. We have not tried this case before. This is a law suit in itself.

The Court: This is the first time the case has been tried and counsel is correct. A claim has been filed.

Mr. Gillard: I will amend the word "case" and say "matter." In connection with this claim for this deduction, the matter has been presented previously by the plaintiff to the Commissioner of Internal Revenue, and contrary to what Mr. Fink told you, what the Commissioner of Internal Revenue said was, "No, you do not have a business bad debt. You have a non-business bad debt," and the Court will instruct you, I believe, [2*] that what a non-business bad debt means is that the parties were entitled to take their losses in accordance with the provi-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

sions of the Internal Revenue Code providing for losses in the same manner as for short-term capital gains, and in denying the claims made by plaintiff, the Commissioner of Internal Revenue allowed each one of these plaintiffs on their tax returns for 1947 a deduction of \$1,000.00. That is the short-term capital gain provision. The Commissioner of Internal Revenue said, "You have taken your loss. It is a normal kind of loss that you would get by making your investment and losing it. You are entitled to this provision in the Internal Revenue Code which makes provision for that kind of loss. Each of you can take \$1,000.00 for 1947 off your income, and you can take \$1,000.00 off your income for each of the succeeding five years. That is the issue before you, as to whether or not that determination by the Commissioner of Internal Revenue is correct or whether the plaintiff is correct, that he is entitled to a different kind of tax treatment for the loss, which is admitted, which would allow him to offset it against his total income rather than \$1,000.00 per year as I have indicated for a total of six years.

Mr. Fink also made some reference to the solemn contracts of the parties, which is Exhibit 2 herein, and he said to you, "If some of the jurors and I had entered into this contract, and we said we were going to engage in this business, and then [3] the Government came along and said you were not in that business, you would be surprised, you would be amazed, you would be insulted."

The answer to that proposition is two-fold, ladies and gentlemen. If Mr. Fink really believed that all

there was to this case was this contract that the parties entered into, and that in and of itself and by itself was sufficient to sustain the claim, he would have put that contract into evidence and rested, period. But obviously an agreement to do something is not doing it. You heard, for example, the questions directed to the attorney, Mr. Grupp, on the stand by the Court, and he explained what happened in the incorporation. The Articles of Incorporation are also a contract. They are filed with the Secretary of State but they just sit there. There is no business being conducted at that time. You have to do something in the future in order to be in business. The fact that you say to yourself, for example, "I am going to go into the motion picture business," that does not put you in the motion picture business. The fact that you and I together say, "Let's go into the motion picture business," doesn't put us into the business. You have got to do something to be in business, and that is why Mr. Fink did not just put this contract in evidence and rest. It does not have the force and effect that he maintains it does have. It is just an indication of what they desire to do in the future. The [4] question is, What did they do in the future?

The third thing that strikes me about Mr. Fink's opening statement to you is a thing which has been peculiar throughout this entire case. It seems to me it is more like a smoke screen that a destroyer lays down to hide the real issues, in that case the target, in this case the real issues in the case. He talked to

you in grand and glowing terms about the motion picture business. He talked to you about getting the story, getting the stars, getting the director, studios, cameras, officers, staff and ideas. He talked about the resale of the picture. He said it was a business of experimentation. Ladies and gentlemen, the Kochs were not in the business of experimentation. The Kochs were not in the business of securing stories or stars, studios, cameras or officers. That is the motion picture business, and this entire case and most of the evidence that has come from the witness stand and almost all Mr. Fink's argument has been directed to deceiving you as to what the issue in this case is. The issue is not whether the Kochs are in the motion picture business; the question which will be submitted by the Court for answering is, "Were the Koch family regularly in 1947 engaged in the business of financing motion picture productions?"

Now, if the Kochs had wanted to be in the motion picture business, their partnership would have provided something like the Articles of Co-partnership of Ambassador Pictures Corporation, [5] which say, "The purpose for which this corporation is formed is generally to engage in creating, photographing, manufacturing, exhibiting, exploiting and otherwise dealing with respect to motion pictures."

Or even it would have been the same as the Articles of Partnership between Hirsch and Sebastian: "It is the purpose of the parties to hereby form and create a general partnership for the purpose of engaging in the business of producing mo-

tion picture photo supplies by use of partnership-owned means, etc.”

But that is not what the Kochs were doing, ladies and gentlemen. That is not even what they intended to do. The said partnership business will, in addition to the luggage business, engage in the business of financing motion picture productions either by direct participation in such productions, by way of stock investments or loans to motion picture producers, and therefore, pursuant to those Articles of Partnership, the question the Court is going to submit to you is, Were the Kochs in the business of financing motion pictures? Not were they in the motion picture business, a very limited phase of that whole operation. And so what you have seen in this case is an attempt to give you this big broad picture of what the motion picture business is and to show Mr. Koch moving around and talking to all these people and saying, “Well, he must be in the motion picture business.” But that is not the question. [6]

You will recall I asked Mr. Koch on the witness stand, “And all of your activities were under and pursuant to the authority contained in your partnership articles?”

And he said, “Yes.” Ladies and gentlemen, anything that Mr. Koch did that was in excess of the authority contained in these articles of partnership was unauthorized, and the Court will instruct you that only the activities of Mr. Koch which were authorized under the partnership articles can be considered to be partnership business. You cannot have an agreement to do one thing and have a man

go out and do something else and bind you. If you have agreed with another individual to sell something, and that is all, he can't bind you by going out and making a contract to buy something else. You would not be bound by that.

In this case Mr. Koch was authorized to finance motion pictures; that is all, by stock participation or direct loans. That is his only authority. Anything he did beyond that was beyond the scope of his authority and not binding upon the partnership nor of benefit to the partnership.

Mr. Fink also made a very moving statement with reference to one-for-all and all-for-one. I am going to get into that later, but preliminarily I am going to call your attention to the fact that with reference to the Ambassador Pictures Corporation, Mr. Maurice Koch invested his own money. He said if you will recall, from the stand, the partnership did not [7] have any money and he invested his own money. When the assets he had acquired in that fashion were sold, he got the money back and put it in his pocket. "All-for-one and one-for-all"—maybe so, but that is an example of the fact that everything Mr. Fink has told you is not exactly true. To find out what the evidence is which you should properly consider to determine the question the Court is going to submit to you, "Was H. Koch & Sons in the business of financing motion picture productions," you should look at these facts.

The loss that was incurred in Copacabana was admittedly financed by the partnership. It was admittedly an investment in that film and it was

admittedly lost. The reason why you have had all this other evidence and this other testimony, in addition to the Copacabana affair, is because the plaintiffs realize that that one transaction, standing by itself, is insufficient for you to find that they were regularly engaged in that business of financing motion picture productions. You can't reach into your pocket and make an investment in one instance and that is all, and come to the conclusion that you are regularly engaged in business, because, one, a discussion does not constitute a business. It is an isolated investment and that is all it is. Therefore, in order to try to buttress their case and to show that this one transaction was something other than it normally would be, they tried to produce in here other evidence to show that by virtue of other activities, [8] they were engaged in the business of financing. That other business, then, would reflect upon what they did in Copacabana and allow you to come to the conclusion that they were in the business of financing.

Let's see how successful this other evidence is. You will remember that I asked Mr. Koch—this was towards the close of the cross-examination—"Mr. Koch, What other investments were made by H. Koch & Sons during the years 1946 and 1947?"

He said, "None," and he was very crest-fallen.

I said, "What other investments were made in 1946 and 1947 which resulted in the production of motion pictures?"

The answer again was "None." Ladies and gentlemen, you have here during the critical period the

Copacabana venture and that is all you do have. All the rest of these activities that were engaged in were either attempts or they were intents or wishful thinking of some kind, but, ladies and gentlemen, we submit to you that the intention or desire of the party does not put him into the business of financing any more than the intention or desire expressed in the articles puts them into business. You have got to do something tangible. The question is, "Did he finance motion picture productions in 1947?" You are perfectly at liberty in drawing your conclusion in that, and I think properly you should disregard in reaching you final conclusion the attempts which resulted in nothing. [9]

We had an awful lot of activity, as evidenced by the testimony from the witness stand, in things which never even resulted in any kind of financial deal at all. For example, all of Mr. Koch's talk about Monogram Pictures, Al Green and his six pictures, and the Fred Fisher story—we had an awful lot of talk about those things, but we had very little financing—in fact, we had no financing at all.

I think about half your time in this courtroom has been taken up with hearing about "The Hill of the Hawk." That was apparently a very fabulous thing, and every witness on the stand has talked about "The Hill of the Hawk," and again what was the financing on that?

Incidentally, "Hill of the Hawk," as you will recall, was dropped on the recommendation of Mr. David Sebastian. It was a little difficult, you will recall, for me to get him to admit on the witness

stand that he had made the recommendation. He tried to attribute the decision to Maury Koch. The other witnesses have all tried to help Maury Koch, and that was a logical thing for them to do, because they are closely associated with him. He tried to help him out by passing that over to him, but he finally had to admit that he had made the recommendation after reading the script, that it would not make a good picture, and Maury Koch got his money back. No financing.

The interesting thing about the financing side of that [10] is that this was not partnership money at all. Everything we have heard about the "Hill of the Hawk" and all the ramifications of it were not partnership business, not one single iota of it. Let me read you from the partnership agreement, paragraph 2(a):

"Moneys advanced by individual partners over and above the sum advanced by this partnership shall be first refunded to such partner individually.

"(c) The profit on such sum or sums advanced by any one or more partners over and above that advanced by the other partners shall belong to the individual partner or partners advancing the excess."

Maury Koch said when he got his money back from this "Hill of the Hawk" venture by the sale of the stock in Ambassador Pictures and the sale of the rights that he put the money into his pocket. It didn't go into the partnership. It just so happened that the money that he got back was exactly the same amount that he put in.

I pose to you the question, What would happen if Maury Koch had made \$25,000.00 on it? Wouldn't it likewise have gone into his pocket under the partnership agreement? He was required to do so. The partnership had required and allowed him to take that profit all by himself. That is just speculative. It is not necessary for us to answer it, but it demonstrates this was Maury Koch's own affair, and I believe the [11] Court will instruct you that if you find in any one of these transactions Maury Koch was acting on his own individual behalf, that transaction cannot be taken into consideration by you in determining whether H. Koch & Sons was in the business of financing motion picture productions.

What did Maury do in this Ambassador Pictures thing? First, he took his own money, \$7,000.00, and bought all the stock in the Ambassador Pictures Corporation. After he had all the stock, he took \$10,000.00 more of his own money and loaned it to himself as sole stockholder in Ambassador Pictures. And then third—and this was rather cute—as President of Producers' Finance Corporation he loaned himself as sole stockholder of Ambassador Pictures Corporation, another \$8,000. The cute part about that was, on direct examination Mr. Koch only put into evidence, or Mr. Fink got evidence through Mr. Koch only on the letter transmitting that \$8,000.00 check. That was Exhibit 34. The letter on the letter-head of H. Koch & Sons, Luggage Manufacturing, was addressed to Mr. Max Fink:

“Dear Max: Enclosed you will find the last pay-

ment, which is \$8,000.00, for the book 'Hill of the Hawk.' Sincerely, Maury."

Mr. Fink I think you ought to read the letter, counsel.

Mr. Gillard: I will read whatever part I desire, counsel, and you may read whatever part you desire.

But he did not put the check in evidence. The check was [12] enclosed, but he did not put it in evidence. You may recall I had to ask for the check on cross-examination. Mr. Fink finally produced it, and I asked Mr. Koch, "Was this the check that was mailed with Exhibit 34?"

And he said, "Yes."

That check turned out to be a check of Producers' Finance Corporation. They did not want to let you know about that too easily, but the letter transmitting it was a letter on the Koch Manufacturing letterhead, not a letter from Producers' Finance, signed by Maury P. Koch, president.

So the total amount of money that Mr. Koch invested in this thing was \$17,000.00, not \$25,000.00 as they wanted you to believe in the first place.

Secondly, it was all Mr. Koch's personal money and not partnership money. Therefore, ladies and gentlemen, I believe under the instructions you will receive from the Court you can and should disregard all testimony with reference to Ambassador Pictures Company, with reference to the "Hill of the Hawk," with reference to any other activities Mr. Koch engaged in in that connection.

What other financing activities were there? There was only one other than that, and that was Pro-

ducers' Finance Corporation, which was formed, you will recall from Mr. Grupp's testimony, and the articles are in evidence, in about October of 1947. But the negotiations with reference to any activities [13] that that corporation was going to engage in were not concluded in 1947. As a matter of fact, very little had been done. One exhibit in this case which the defense put into evidence was a letter from Maury P. Koch, a letter from Producers' Finance Corporation by Maury P. Koch to Mr. Jack Chertok, setting forth in preliminary form their oral understanding prior to the time that anything could be reduced to formal agreement by their attorneys. At this time, in January 29, 1948, not one cent of money had been put into Producers' Finance Corporation by anybody, and that is why Mr. Koch had to say in response to my question, "No other money was spent by the partnership in 1947 and 1948, no money except the Copacabana loan was advanced during the years in issue in this suit," because, as I have just explained to you, the Ambassador Picture thing is out so far as the partnership is concerned. Mr. Koch admitted on the stand that in 1946 and 1947 the partnership advanced nothing except the Copacabana deal. The Court indicated to you that you could try and relate that back to the activities of 1947 the financing that took place in 1948 insofar as you believe those things are pertinent to the activities in 1947. However, there is one other very interesting thing about that and that is that Producers' Finance Corporation in 1948 lent some money to Apex Film Corporation for the

purpose of producing some Army training films. The witnesses have indicated some Army training films [14] were produced, but we do not know when they came out. So far as the record shows, they came out this year. We do not know. But the most interesting thing is that it was indicated by Maury Koch on the witness stand, indicated to you by Mr. Fink in his opening argument, that Maury Koch got a million dollars of financing for them in that connection. I think the Pacific National Bank would be interested in that, because my recollection is that Pacific National Bank advanced that money and the Pacific National Bank advanced it not to Maury Koch but to Apex Films Corporation. Maury Koch was not advancing in that transaction in any way. The loan was from the bank to them.

The other interesting thing about this, the most that could be said is that Maury Koch had had a hand in introducing Mr. Chertok to the bank, making a sufficient recommendation to the bank that they would be interested, and the most Mr. Koch is doing is acting as a broker. He is bringing two people together to see if they can't arrange a loan between them. Mr. Koch is not in the brokerage business. His business is advancing the money of H. Koch & Sons in motion picture productions. His business is not acting as a broker for somebody else.

Even if you would assume that that activity of his in 1946 and 1947 was a relevant and material thing as far as time was concerned, it would not be relevant as far as the business of H. Koch & Sons is concerned.

I think we ought to devote a little time to the witnesses [15] who appeared on behalf of Mr. Koch. First in order of appearance was Mr. Grupp. He had been his attorney for a number of years, an attorney who was deeply indebted to him and his family by virtue of favors given to him by Mr. Koch's father, so deeply indebted that for 20 years he worked for the Koch family and during all this period of time for H. Koch & Sons, particularly for Maurice P. Koch, for nothing—a man so deeply indebted that he worked for nothing. And if you can believe Mr. Grupp's testimony as to the amount of time he spent with Mr. Koch in these transactions, it comes almost to one-third of his time in each year, 1947 and 1948. Mr. Grupp, according to his testimony, spent one-third of all of his time in those two years for nothing. I think you can rightly say that there is an exaggeration somewhere in that testimony.

Secondly, Mr. Grupp is an attorney and he knows the difference between corporations and partnerships. He formed both of these for the Koch family. He drew up the Articles of Co-partnership and he drew up the Articles of Incorporation for Producers' Finance, and yet on the stand under direct examination he testified that all during the year 1947 he was acting for H. Koch & Sons as their attorney. But when the Producers' Finance Corporation was formed as a corporation, and he was counsel for that corporation, in all activities the corporation had he was counsel for the corporation and not for H. Koch & Sons. And you heard him admit to me

on [16] cross-examination that on the date of the incorporation he was counsel for Producers' Finance Corporation.

Then there was Mr. Sebastian. He is brother-in-law of Mr. Koch, and as such deeply interested in him. In addition to that, Mr. Sebastian had left a job which paid him a salary, I assume, with Columbia Pictures for the purpose of trying to make a living, and yet if you can believe his story, he worked hundreds of hours in conferences. He went over his time schedule also and it amounted to days, weeks and months, for nothing—for Mr. Koch for nothing. He said, "He paid me a little expense money," and he maintained during his testimony on direct examination that he was the agent for Mr. Koch—for nothing—and he maintained on cross-examination that he was the agent for Mr. Koch, again working for nothing. That is, he maintained that until I introduced in evidence the Articles of Co-partnership between himself and Mr. Hirsch, and you will recall that Mr. Sebastian became, I believe, the associate producer in Copacabana. Here is what the Articles of Co-partnership between Hirsch and Sebastian provide:

"It is contemplated by the parties hereto that the motion pictures may be produced by corporations specially organized for that purpose and which Hirsch & Sebastian, or either of them, may become an officer, director or employee. It is understood and agreed that the parties may act as such officer, director or employee of such [17] corporation, but all proceeds in the form of bonuses, salaries, or any

other thing of value which may be paid or turned over to either Hirsch or Sebastian as officer, director or employee shall be delivered forthwith to the partnership in accordance with the terms and purposes of this agreement."

Despite his conclusion that he was the agent for Mr. Koch, Mr. Sebastian was a partner of Mr. Hirsch and bound under the terms of this partnership agreement to act on behalf of Hirsch & Sebastian, and he worked for Hirsch & Sebastian, and even if he were employed individually by a corporation—and he was—that those profits, salary, would go into that partnership.

Ladies and gentlemen, he was not Mr. Koch's agent. He was an independent contractor. He has a mission to perform for himself. He had to leave. He had to get a job. One way he could get a job was to try to get Mr. Koch interested in putting some money into a deal where he could get a job as a producer or an associate producer, or whatever he was.

Mr. Eisenberg spent a long time in Hollywood. We do not know his relations with the Koch family. We presume inferentially that Hirsch & Sebastian, we have heard some indication that Hirsch & Sebastian were stockholders in Beacon Pictures Corporation. Mr. Eisenberg was hired by Beacon Pictures Corporation as a controller. There is some relationship and some close relationship between them and Mr. Koch. He was [18] hired as a controller. The controller is supposed to be there to find out that the moneys are spent properly that are avail-

able. Mr. Eisenberg in his eagerness to help Mr. Koch in this case abdicated his job as controller. Mr. Koch, he said, went over the figures on the budget, and on direct examination he said Mr. Koch made suggestions with reference to cutting down some sets, cutting out some dance routines, and if Mr. Koch had not done that, the picture would have gone over its budget.

First, wouldn't you assume that that would be the job of the controller? Secondly, on cross-examination I asked Mr. Eisenberg, Wasn't the budget less than the available moneys? And he said, "Yes." The budget was already below the available moneys, and yet he got up here in his enthusiasm, and again I do not blame him because you know and I know that Mr. Maury Koch is a personable and charming man, but he did a lot of selling on this witness stand. He is a salesman. He has done a lot of favors for these witnesses and they, to the best of their ability, are going to return it. I do not mean to infer that these men are deliberately misstating, but in their enthusiasm they went too far. The fact remains that the budget was less than the available moneys, and therefore it would have been impossible for Mr. Eisenberg to say that if Maury Koch had not cut these items out of the budget, the picture would have cost more than the amount of money available. So in his [19] enthusiasm of helping Mr. Koch, he went a little too far.

I say each of those three witnesses were very partisan witnesses, and you have a perfect right to view with skepticism some of their exaggerations.

Mrs. Abel, the testimony she gave concerns a matter which is not going to be presented to you for decision, and so it is not important to discuss her except one thing is apparent. Here again you have a witness who is willing to go overboard for Mr. Maury Koch. At his direction she altered the partnership books—altered them, and came in here with a set of books and tried to reflect something that did not originally occur on those books.

The Court: Is this a convenient place to take a recess, counsel?

Mr. Gillard: Yes, your Honor.

(Recess.)

Mr. Gillard: Thank you, your Honor. The watch is for timing. Each side has been allotted a definite period of time in which to present what it hopes to be its enlightenment of the case, and according to my calculations I have about 20 minutes left.

The key and central figure in this case, of course, is Maurice P. Koch, and he obviously is a very likeable man. He is obviously a very jolly man. He is a salesman in the best sense of the word. His business is selling and, of [20] course, one of the things he was doing on the stand is one of the things he has devoted his life to, and that is selling, and his purpose in being here today was to sell his side of the story to you. The thing about it, however, is that he has lived with this experience for the past ten years, and as so often happens in our experiences, the further we get away perhaps from a given event, the more dim becomes the individual

details, and the broader becomes the outline and the broad aspects of it, and we tend to exaggerate not only the importance of events, but our participation in those events. To a man like Maury, affable, extrovert type, he would naturally place more emphasis on the pronoun "I" than was warranted by the original facts. It also make a better story. You know perfectly well a fisherman does not like to come home and say he caught a fish that was that long (indicating). It makes a better story to say the fish was that big (indicating). I think we have quite a bit of that presented to you in this case by Maury Koch.

You may recall, for example, on direct examination he went down and spent three weeks in Hollywood at the time Copacabana was about to be filmed. He went in there and he went over the budget, cut costs, he cut out sets, he cut out dance routines, he fired a couple of writers, he viewed the film, and after each day he made suggestions as to the cutting of the film. It is kind of odd almost to hear him say on [21] cross-examination that the film had a producer, a director, an associate producer, controller, property man, filming editors, and all the rest of those employees. But apparently, as I say, the story has been enlarged in Mr. Koch's mind—and I do not say this in any derogatory sense; it is a normal human tendency to enlarge our own activities, and I believe you can rightly find that there has been a great deal of exaggeration in this case. This exaggeration with reference to non-important details—and I say that because actually, although

Mr. Koch had a legitimate right to be in Hollywood—I mean, he was a substantial investor in Copacabana and as such he was interested in seeing what they were doing down there with part of his money—still, properly speaking, would you say that that was a necessary function or a proper function for him to engage in under the partnership articles which allowed him to invest or to lend money for motion picture production? He certainly was interested. He wanted to see what was going to happen to his money. But for him even to suggest that he is engaged in these other activities—even assuming he did—does not necessarily make it a legitimate function. You will recall the testimony of Mr. Eisenberg that the budget was less than the available moneys.

But for some of the more important evidence this tendency to exaggerate becomes critical. For example, Mr. Koch characterized almost everybody he came in contact with as his [22] agent. Everybody he talked to throughout this entire trial, from his testimony, he would conclude was his agent. Mr. Hirsch, Mr. Sebastian, Mr. Chertok, Mr. Green, Mr. Harry Fox, maybe even Mr. Max Fink. But, ladies and gentlemen, you do not create an agency merely by having Mr. Koch say, “He was my agent.” An agency springs from a factual relationship, and in order to come to a conclusion that a given individual was an agent, there should be facts from which you can make up your own mind as to whether that agency existed. For example, under Mr. Koch’s interpretation, if any one of you were

to go out and try to buy a piece of property, you would contact the broker, you would contact the seller, you would contact the title insurance company, you would contact the bank. All those people had individual roles to play in a given transaction. Each one is hired by either himself or some other person. They are drawn together for the purpose of making that transaction. But that does not mean that the seller of the property is your agent when you are buying. It does not mean the bank is your agent in that connection for that purpose. These are all independent people who have a job to perform, who were paid by others, not paid by you, and they are only drawn together as a principal in a transaction in which they are interested, and they are not working for you.

That came about, I believe, very clearly in Mr. Koch's characterization of Mr. Sebastian as his agent. I think I [23] have shown you very clearly that Mr. Sebastian was not Mr. Koch's agent. He was a partner of Mr. Hirsch, and all his activity was devoted to the Hirsch-Sebastian partnership and for the benefit of that partnership. Mr. Sebastian was not paid one cent by Mr. Koch.

How does Mr. Sebastian become an agent? Only because Mr. Koch said so, but you do not have to rely on Mr. Koch's legal conclusion that any individual was his agent. You should examine the facts for yourself and determine whether or not Mr. Koch has presented evidence of such a relationship—a form of employment, instructions to him, payment

to him, to indicate that every man he is talking about is or is not his agent.

Another classical example of Mr. Koch's characterization of others as being agents or connected with him in some fashion is in this same Exhibit 34 that I read to you awhile ago, or a part of it. Mr. Fink tells me to read the whole thing. In that letter—and Mr. Fink read the whole thing to you—he said, “Will you please send me some sort of letter advising me that the book is completely paid for and the property of Ambassador Pictures Corporation, of which I own all of the stock now, and, after all, I am responsible to the stockholders.”

Mr. Fink asked him what he meant by that and he said, “my partners.”

Of course, the letter on its face is inconsistent for he owns all of the stock. There are no stockholders. There is [24] one stockholder and that is Mr. Koch. But in the second place it shows the thinking of Mr. Koch in this thing.

Now, you may not want to blame him, or you may feel that even he did believe it. It is very possible that he did believe it, but he was in error, ladies and gentlemen. He was in error. His partners were not stockholders in Ambassador Pictures Corporation. He owned all the stock himself, with his own money, not the partnership money, and all the money that had gone into Ambassador Pictures Corporation was his own money, and he admitted that, so that his characterization of his brothers and sisters as stockholders was erroneous. You do not have to accept his characterization of that any more

than you have to accept his characterization of all the rest of these people as being agents, unless you are satisfied from the evidence that he has demonstrated to you by facts an employment agreement, a delegation of authority, payment to him for the services. The facts alleged make it an agency relationship. If that is absent from the case, these people were not his agents.

We can only point to a few examples like that where we have demonstrated that the conclusions Mr. Koch reaches on the stand were erroneous, but from the demonstrated fact that he was in error you can ask yourselves the question, "What about all the rest of these facts he has told you about concerning which there was no possibility to rebut because the [25] witness was not available?"

Mr. Chertok is in New York, somebody else is dead. You can weigh his testimony as a whole, ladies and gentlemen of the jury, and if you find him wanting in any material respect in his testimony, you are entitled to disbelieve the rest of his testimony.

He also spent a great deal of time in generalization. As a matter of fact, Mr. Fink in his opening statement to you spent a great deal of time in generalization. The whole theory of the plaintiff's case here is to try to snow you under with motion picture business and weigh you down with so many facts and so much evidence that you can't see the issue in the case. You recall Mr. Koch testifying in response to a question by Mr. Kink, "I spent an awful lot of time trying to make deals, tie deals to-

gether, telephone conversations, making contacts with this fellow, talking to Hirsch, talking to Sebastian." What do you think of that kind of testimony? Feathers. What can you grab into with that kind of testimony which will convince you of any real thing about this case? That kind of testimony is meaningless.

You will remember during the course of this time I objected upon numerous occasions. It was never followed up. The preliminary matter was gone into:

"Did you have a discussion with Mr. Hirsch?" Yes, he did. He met Mr. Hirsch on eight separate occasions. [26]

"How about Mr. Sebastian?" The same thing. He met him at the Friars' Club, he met him here, he met him there. And what happened? Nothing. He just told you he had discussions and that is all. Is that the kind of evidence you are going to accept in this case to satisfy you that he was in the business of financing motion pictures? Mr. Koch is a very energetic man. The evidence clearly shows that he is not only energetic but in some fields he is very capable. He was the boss, the managing partner of H. Koch & Sons. During the year 1946 he was also the only salesman in that organization. That was a business grossing in sales in excess of a half million dollars a year, and he ran the show, ladies and gentlemen. He ran the whole show. He not only did all the buying, getting all the merchandise, arranging for all the financing, securing all the materials, running the place, but he did all the selling, too. \$550,000.00 worth of sales.

In addition to that he was a fifty per cent partner with Mr. Farelli in a merchandising venture in which he devoted a considerable part of his time in 1946, and from which he made a substantial profit, as you noted from his income tax return. In addition to that, at the end of 1946 he was engaged in purchasing a glass fiber plant, which I gather from the testimony is the foundation and basis for the present Koch business, the manufacture of fiberglass luggage and containers. So he was busily engaged in tangible things which you have in [27] front of you and which you can see.

Stacked against those tangible evidences of the things which occupied his time, he says he spent 30 per cent of his time in the motion picture business. Ladies and gentlemen, I think you will find that also is an exaggeration, and I think you are entitled to believe it was an exaggeration.

Now, if you disregard all the generalities in the case, which are feathers, and which you cannot put your finger on, if you find that these agents were non-existent, that each one of these people he is talking about had his own business to conduct, that he was drawn into it, came in contact with Mr. Koch because they had something to sell, something to get out of him; they were acting on behalf of themselves or their client and he was acting for himself. This was his business. If you do not attribute all their activities—and this has been the main thrust of the plaintiff's case, ladies and gentlemen of the jury—Mr. Koch has tried to graft onto himself and to take credit for everything that every-

body else did in the motion picture industry. I do not think you are going to swallow that story. Those people are down there to make a living for themselves. They may be a happy family, everybody in Hollywood, or they may not. But you can rest assured they are down there to make a living. They had to work for themselves. Mr. Koch did not pay them anything. So if you disregard all the woof about these agents, and if you [28] disregard all of these attempts which never materialized into fruition—and that is all they were—they meant no more as far as the main issue in this case is concerned than the intent expressed in the partnership agreement, “I will enter the motion picture financing business,” and he didn’t do it—if those things are left out, you wind up with the case exactly where you started, with the very first thing, Copacabana. There is nothing else in the case but Copacabana. I have demonstrated to you, I believe, that that is the only thing into which there was any money put in 1946 and 1947. It was the only picture that was produced during that period of time. It was the only transaction in which the Koch partnership put any money in that period of time. The Ambassador Picture Corporation is out completely because it is his own individual baby and not the partnership’s, and also the transactions in connection with that, including “Hill of the Hawk”—and, as I said to you, about half of your time has been spent listening to that “Hill of the Hawk” transaction, and it does not contribute one iota to this case as far as your consideration is concerned. That was Maurice

P. Koch's private baby. The partnership had no part of it.

The last thing and only thing left was Producers, in which nothing was done in 1947, no money was put into it in 1947, and in addition to that, even if you attribute to Maurice P. Koch and through him the partnership some activity [29] in 1947 for Producers, you have to remember this, that it was a corporation. You are entitled to believe and to find that when a man elects to form a corporation and do business through a corporate form, then those things that are done by that corporation are the business of the corporation. H. Koch & Sons, the partnership, was to be in the business of financing motion pictures. Ladies and gentlemen, that means H. Koch & Sons. It does not mean Producers Finance Corporation, and the very little bit of activity in this case which took place and that started at the end of 1947, and this tiny amount of it was the activity of Producers' Finance Corporation. I asked Mr. Koch on the witness stand and he told me, "Yes, everything I did from the date of the formation of that corporation, I did as the president of Producers' Finance Corporation, not as a partner of H. Koch & Sons," ladies and gentlemen, not as a partner of H. Koch and Sons. He did it as president of Producers' Finance Corporation. He gave you the answer on the witness stand: "I acted as president of Producers' Finance Corporation." That is not H. Koch & Sons.

We submit to you, ladies and gentlemen, the finding of the Commissioner of Internal Revenue.

who was a duly and regularly appointed executive officer of the Government, sworn to administer Internal Revenue Laws, that his findings that this was a non-business bad debt, and under the Internal Revenue Code provisions that each of the seven parties to this action [30] were entitled to take a deduction of \$1,000.00 per year against ordinary income for each of six years, was the correct conclusion in the case, and we submit to you that based upon the only fact remaining in the case, to wit, the Copacabana investment, we submit to you that by virtue of that one investment that you cannot find that H. Koch & Sons were in the business of regularly financing motion picture productions.

I thank you very much for your time and attention.

[Endorsed]: Filed July 18, 1957. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant, Except the Reporter's transcript of evidence and proceedings is not included for the reason it has not been delivered to this office for filing:

Excerpt From Docket Entries.

Complaint.

Answer.

Special Verdict.

Order Denying Motion for Judgment Notwithstanding Verdict and to Set Aside Special Verdict.

Findings of Fact and Conclusions of Law.

Judgment on Special Verdict.

Findings of Fact and Conclusions of Law Tendered by Plaintiff.

Findings of Fact and Conclusions of Law Tendered by Defendant.

Notice and Motion for New Trial.

Memorandum in Support of Motion for New Trial.

Order Denying Motion for New Trial.

Plaintiffs' Requested Instructions to Jury.

Defendant's Requested Instructions to Jury.

Notice of Appeal.

Appeal Bond.

Memorandum of Plaintiff re Effect of Presumption That Assessment of Commissioner of Internal Revenue Is Correct (tendered in open court).

Order Extending Time to Docket Record on Appeal.

Order Extending Time to Docket Record on Appeal.

Appellants' Designation of Record on Appeal.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 10-b, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36.

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J and K.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 17th day of July, 1957.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein as designated by the attorney for the appellant:

Reporters' Transcript of Trial, November 26, 29 and 30, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 22nd day of July, 1957.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15645. United States Court of Appeals for the Ninth Circuit. Harold M. Koch, Bessie Koch, William L. Koch, Rose Koch, Rebecca Koch Abel, Maurice P. Koch, and Daisy Koch, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 17, 1957.

Docketed July 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil No. 34762

HAROLD M. KOCH, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION AND ORDER

It Is Hereby Stipulated that the exhibits designated on appeal in this action may be considered in their original form without printing, and without prejudice to either party to print any exhibits as an appendix to the brief to be filed.

Dated: August 6, 1957.

/s/ LEON SCHILLER,

Attorney for Appellants.

LLOYD H. BURKE,

United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,

Assistant United States Attorney, Attorneys for
Appellee.

/s/ ALBERT LEE STEPHENS,

/s/ RICHARD H. CHAMBERS,

/s/ FREDERICK G. HAMLEY,

Judges of the United States Court of Appeals for
the Ninth Circuit.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF LEON SCHILLER IN SUPPORT OF STIPULATION AND ORDER RELATING TO PRINTING OF EXHIBITS

State of California,

City and County of San Francisco—ss.

Leon Schiller, being first duly sworn, deposes and says:

I am one of the attorneys for appellants in the above-entitled action. In the trial of said action, appellants offered in evidence thirty-seven exhibits, and appellee offered in evidence eleven exhibits. Many of the exhibits are quite lengthy. At this time it is not feasible for appellants to extract from these various exhibits the portions of each exhibit to which reference must be made in the briefs to be presented in this appeal. To print all the exhibits in their entirety would entail a tremendous printing cost to appellants. At the time briefs are filed with the court, counsel can distill and extract from the exhibits the portions of particular importance to the court and print them in the appendix to the brief. The granting of the order by the court will result in a substantial saving in cost to appellants and will protect the rights of both appellants and appellee.

/s/ LEON SCHILLER.

Subscribed and sworn to before me this 7th day
of August, 1957.

[Seal] /s/ NITA LAND,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed August 13, 1957.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON
WHICH APPELLANTS RELY

The points upon which appellants intend to rely
on this appeal are as follows:

1. That the Court erred in granting judgment
for defendant.
2. That the verdict of the jury on the special
interrogatory was contrary to all the evidence in
the above cause and is not supported by the evi-
dence.
3. That the Court erred in failing to grant a
directed verdict in favor of plaintiffs.
4. That the Court erred in failing to grant mo-
tion for judgment notwithstanding the verdict.
5. That the Court erred in excluding evidence,
both oral and documentary.
6. That the Court erred in admitting evidence,
both oral and documentary.

7. That the Court erred in failing to give necessary instructions to the jury and in giving the jury instructions contrary to law.

8. That plaintiffs were not accorded a fair trial and due process of law.

9. That plaintiffs' cause was prejudiced by reason of prejudicial misconduct of counsel for defendant.

10. That the Court erred in permitting comment upon, as well as making comment with respect to, matters not within the record in the instant cause and which prejudicially affected the trial and decision in this cause.

11. That the Court erred in granting motion for directed verdict with respect to the plaintiffs Maurice B. Koch and Daisy Koch; and likewise thereby prejudiced the rights of all other plaintiffs.

12. That the Court erred in making findings of fact which are not supported by the evidence and which are in fact contrary to all the evidence in the above cause.

13. That the Court erred in its findings and determination that certain stipulations were entered into which were, in fact, not entered into.

14. That the Court made erroneous conclusions of law.

15. That the Court erred in its judgment rendered in the above cause.

16. That the Court erred in failing to grant a mistrial in the above cause and erred in its failure to grant a new trial.

Dated: August 2, 1957.

MAX FINK,
LEON SCHILLER,

By /s/ LEON SCHILLER,
Counsel for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed August 7, 1957.

